United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

202-70

263

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24878

STERLING DRUG INC.

Plaintiff-Appellant

v.

FEDERAL TRADE COMMISSION, et al.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

Robert V. Zener,
Attorney
Department of Justice
Washington, D.C. 20530
Attorney for Appellee

Herbert A. Bergson
Lionel Kestenbaum
Murray J. Belman
Bergson, Borkland, Margolis
& Adler
888 Seventeenth St., N.W.
Washington, D.C. 20006
Attorneys for Appellant

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July	7 -	Complaint, filed by Bergson, Borkland, Margolis & Adler, Esquires
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"	28 -	Motion for partial summary judgment, with supporting memorandum, filed by Bergson, Borkland, Margolis & Adler, Esquires
November	17 -	Opposition to motion for partial summary judgment filed by United States Attorney on behalf of defendants.
"	25 -	Hearing on motions
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"	4 -	Order, with memorandum opinion, denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment, filed by Judge Bryant.
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of STERLING DRUG INC., a corporation.	)	DOCKET NO.

COMPLAINT

The Federal Trade Commission has reason to believe that Sterling Drug Inc., a corporation and the respondent herein, has merged with Lehn & Fink Products Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (U.S.C. Title 15, Section 18); and therefore, pursuant to Section 11 of said Act, it issues this Complaint, stating its charges in that respect as follows:

I.
Definitions

1. Household liquid disinfectants and deodorizers includes household products in liquid form which are generally viewed by the consumer primarily as disinfectants and which have secondary deodorizing properties.

2. Household aerosol disinfectants and/or deodorizers includes (a) household products in aerosol form which are generally viewed by the consumer primarily as deodorizers and which have secondary disinfectant qualities, and (b) household products in aerosol form which are only deodorizers and which have no disinfectant properties.

3. Household liquid and aerosol disinfectants and deodorizers includes all products falling into either Paragraph 1 or Paragraph 2.

II.
Respondent

4. Respondent, Sterling Drug Inc. is now, and was at the time of merger, a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 90 Park Avenue, New York, New York, 10016

5. Respondent, directly and through its various subsidiaries, is engaged principally in the manufacture and worldwide sale of a broad line of medicinal preparations and pharmaceutical specialties, some of which are generally referred to in the trade as "proprietaries" and some as "ethicals".

6. On December 31, 1965, total assets of respondent were $221,175,000. During 1965 respondent's total net sales were $303,000,000 (approximately 58% of which consisted of domestic sales), resulting in a net income of $33,643,000. Respondent's 1965 net sales were almost double those of 1956.

7. Proprietary drug products, i.e., those generally sold over the counter and without prescription, accounted for approximately 45% of respondent's 1965 sales. These products, including such well-known brands as "Bayer Aspirin," "Phillips' Milk of Magnesia," "Haley's M-O," and "Fletcher's Castoria," are marketed via advertising directly to the consumer. Respondent's proprietary products are sold by its Glenbrook Division's nation-wide sales organization to drug and non-drug wholesalers and jobbers and retail drug, grocery, department, variety and food stores.

8. Ethical drug products, i.e., those which usually require a prescription, accounted for approximately 39% of respondent's 1965 sales. Such products are marketed primarily through wholesale and retail drug outlets and are promoted through professional channels as well as being advertised in scientific and medical journals.

9. Non-drug products accounted for approximately 16% of respondent's 1965 sales and included bulk chemicals, food enrichments, animal feed additives, pigments for the textile and printing industries, rodenticides, pesticides, disinfectants, anti-bacterials and personal care products.

10. Respondent's sales of proprietary medicines and household consumer products in the United States during 1965 totaled $91,426,000. Bayer Aspirin (regular) was respondent's largest selling product with domestic sales of $41,672,000 in 1965. Respondent's brands of "Phillips' Milk of Magnesia," "Haley's M-O," "Fletcher's Castoria," and "Midol" are also leaders in their respective fields.

11. Respondent expended approximately $31,000,000 in 1965 for media advertising of all its proprietary and household consumer products, $12,530,000 of which was spent in advertising Bayer Aspirin (regular).

12. Respondent has been, and continues to be, aggressive in introducing new proprietary products and expanding its existing product lines into new markets. Respondent also conducts continuing research in the analgesic, anesthetic, disinfectant and related fields.

13. During 1965, respondent sold approximately $700,000 of its Roccal, Cyncal and Bithional brands of ammonia based disinfectants to restaurants, schools, bars, hospitals and other institutional establishments.

14. At all times relevant herein, respondent has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act.

III.
Lehn & Fink Products Corporation

15. Prior to, and at the time of its merger into Sterling, Lehn & Fink Products Corporation (Lehn) was a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 445 Park Avenue, New York, New York, 10022.

16. The business of Lehn was the manufacture and sale of disinfectants, germicides, sanitary and maintenance products, cosmetics, and personal care products.

17. As of June 30, 1965, Lehn had total assets of $22,048,631. For the fiscal year ending June 30, 1965, Lehn reported net sales of $66,702,978, resulting in a net income for the period of $2,556,428. During the decade 1956-1965, Lehn more than doubled its annual net sales.

18. Domestic consumer products accounted for approximately 62% of Lehn's fiscal 1965 sales and included such well-known brands as "Lysol" disinfectant, "Medi-Quik" spray antiseptic, "Stri-Dex Medicated Pads," "Dorothy Gray" and "Tussy" cosmetics, and "Beacon" floor care products. These consumer products were sold, primarily by a direct sales force, to wholesale and retail food, drug, and variety outlets.

19. Domestic industrial products accounted for approximately 19% of Lehn's fiscal 1965 sales and included a variety of specialty chemical products for disinfection, sanitation, and maintenance. These products were generally marketed to hospitals and hospital supply houses, sanitary and paper supply houses, and other industrial and institutional customers.

20. The international market accounted for the remaining 19% of Lehn's fiscal 1965 sales. The major product lines sold abroad included cosmetics, medicated products, and disinfectants.

21. Lehn was the leading firm in the national household disinfectant industry. In fiscal 1965, sales of Lehn's "Lysol" brand liquid disinfectant amounted to $5,822,000, and sales of "Lysol" brand aerosol disinfectant totaled $12,230,000. "Lysol" liquid and "Lysol" aerosol sales combined accounted for approximately one-third of Lehn's total domestic sales in fiscal 1965.

22. Lehn expended approximately $9,000,000 in fiscal 1965 for the domestic advertising and promotion of its consumer products. Advertising expenditures for "Lysol" brand aerosol and liquid disinfectants -- America's largest selling and most heavily advertised disinfectant -- amounted to slightly more than $3,000,000 during this period.

23. At all times relevant herein, Lehn has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act.

IV.
Trade and Commerce

24. Household disinfectant and deodorizing products are marketed via advertising directly to the consumer and are sold through wholesale and retail food, department, drug and variety outlets.

25. For the twelve month period ended June 30, 1966, total retail sales of household liquid and aerosol disinfectants and deodorizers amounted to approximately $95,869,000. Retail sales of aerosol disinfectants and/or deodorizers amounted to approximately $67,730,000, while retail sales of liquid disinfectants and deodorizers accounted for about $28,139,000.

26. The sale of household disinfectant and deodorizing products is heavily concentrated. In the twelve month period ended June 30, 1966, the top two firms in the household liquid disinfectant and deodorizer market accounted for 63% of total national retail sales, while the top four accounted for 72%. During the same period, the top two and top four firms in the aerosol market accounted for 55% and 78% of total national retail sales, respectively. In the liquid and aerosol market, for the same period, the top two firms accounted for approximately 50% of total national retail sales, and the top four accounted for about 68%.

27. Since 1963, in addition to respondent's merger with Lehn, the second and fourth ranking competitors in the household liquid disinfectant and deodorizer market have been acquired by large diversified firms.

V.
Merger Charged

28. On or about June 28, 1966, Lehn was merged into respondent, at which time holders of each of Lehn's 1,196,903 capital shares received one share of a new preferred stock of respondent, convertible into 1 1/4 shares of common and callable at $55 a share after five years. Upon the merger becoming effective, the separate corporate existence of Lehn terminated, and respondent continued as the surviving corporation.

VI.
Effect of the Merger Charged

29. The effect of the merger of Lehn into respondent has been, or may be, substantially to lessen competition or to tend to create a monopoly in the sale of (1) household liquid disinfectants and deodorizers, (2) household aerosol disinfectants and/or deodorizers and (3) household liquid and aerosol disinfectants and deodorizers in the United States in the following ways, among others:

(a) Actual and potential competition generally has been, or may be, substantially lessened;

(b) Lehn has been permanently eliminated as an independent competitive factor;

(c) Concentration, which was already high, has been, or may be, further increased;

(d) Existing barriers to new entry have been, or may be, substantially heightened;

(e) Additional acquisitions and mergers of household disinfectant and/or deodorizer concerns may be precipitated; and

(f) Future substantial competition has been eliminated by respondent's merger with the dominant producer, with whom respondent would have had to compete had it entered through internal development rather than through merger.

30. The merger by respondent, as alleged above, constitutes a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Section 18, as amended).

WHEREFORE THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A.D., 1968, issues its complaint against said respondent.

FTC APPROVAL OF MILES-S.O.S. ACQUISITION

July 12, 1968

Mr. Kendall M. Cole,
Vice President and General Counsel,
General Foods Corporation,
250 North Street,
White Plains, New York 10602

Re: General Foods Corporation,
Docket No. 8600

Dear Mr. Cole:

The Commission has approved Miles Laboratories, Inc., as purchaser of the S.O.S. business under the general terms and conditions of the June 24, 1968 agreement in principle between General Foods and Miles Laboratories, as submitted to the Commission in the matter of General Foods Corporation, Docket No. 8600.

The Commission has entirely relied upon the information submitted by General Foods and its approval is conditioned upon this information being accurate and complete.

By direction of the Commission.

Joseph W. Shea,
Secretary

REQUEST FOR CONFIDENTIAL TREATMENT

October 25, 1968

Lars E. Janson, Esq.
Federal Trade Commission
Bureau of Restraint of Trade
Washington, D. C. 20580

Re: General Foods Corporation
Docket No. 8600
Final Compliance Report

Dear Mr. Janson:

On behalf of General Foods Corporation, I am enclosing a formal request to the Commission for confidential treatment of certain material described therein which was supplied the Commission's Compliance Division. This request is made as a courtesy to Miles Laboratories, Inc., who is now the real party in interest.

Thank you for your many kindnesses to us in connection with this matter.

Very sincerely yours,

/s/
Carson M. Glass

Enclosure

October 25, 1968

Federal Trade Commission
Pennsylvania Avenue and Sixth Street, N.W.
Washington, D. C. 20580

Re: General Foods Corporation
Docket No. 8600
Final Compliance Report

Gentlemen:

On behalf of General Foods Corporation we hereby request that the Commission classify as confidential the compliance information described below for the reasons set forth herein:

(1) Exhibit VII 3 (b) and (4) of a document dated July 5, 1968 entitled "Memorandum on Divestiture of S.O.S Business by General Foods Corporation."

This material should be classified as confidential for the reasons set forth in a letter dated October 14, 1968 from Jerrold G. Van Cise, Esq., attorney for Miles Laboratories, Inc., to Lars E. Janson, Esq. of the Commission staff. It will be noted that Exhibit VII 3 (b) relates to the market shares of certain products of Miles Laboratories, and Exhibit VII (4) relates to products sold to Miles by General Foods and vice versa. These items are considered trade secrets and they are not really relevant to the S.O.S divestiture.

(2) Report of May 27, 1968 entitled "The S.O.S Business." This report contains a breakdown of sales and profit data for each S.O.S product, S.O.S, TUFFY, SATINA and S.O. ettes, by years and other highly sensitive financial data relating to such products. Of the same confidential nature is the document dated June 3, 1968 entitled "The S.O.S Business - Addendum to May 27, 1968 Report" which contains a breakdown of the sales, cost and profit data by product and customer classification. General Foods requests that the foregoing financial information be classified as confidential for the following reasons:

Public disclosure of this financial data with respect to the products of S.O.S would be unnecessary for the protection of the public interest. Adequate information on the S.O.S business already is set forth in the public record in this proceeding and in the reports of compliance.

Public disclosure also would be prejudicial to the orderly transfer of the S.O.S business to Miles Laboratories in accordance with the objectives of the Commission's Order of Divestiture. Miles Laboratories as the purchaser is faced with the normal but nevertheless substantial problems of taking over and operating S.O.S. Its problems will be multiplied many fold, however, if the intimate details of the S.O. S business are made available to competitors who will be under no reciprocal obligation to disclose comparable financial data.

(3) The dollar amounts of the bids received by General Foods for the S.O.S. assets submitted to the Commission on July 8 and entitled "S.O.S Offers at July 8, 1968."

These bids were submitted to General Foods on a closed basis and have not been disclosed to Miles Laboratories, the highest bidder, or to any of the other bidders. Therefore, although we do not object to disclosure of the names of all the bidders, we request that the amounts of the various bids not be disclosed in order to preserve the confidentiality General Foods has accorded this information.

Miles Laboratories has authorized us to state that it joins General Foods in this request and urges the Commission to give it favorable consideration.

Very truly yours,

/s/
Carson M. Glass
Attorney for General Foods Corporation

FTC APPROVAL OF CONFIDENTIAL TREATMENT

NOV 29 1968

Carson M. Glass, Esquire,
Sharon, Glass, McIlwain & Finney,
Attorneys and Counselors at Law,
815 Connecticut Avenue,
Washington, D.C. 20006

Re: General Foods Corporation,
Docket No. 8600.

Dear Mr. Glass:

This is in reference to your two letters of October 25, 1968, in which you have requested that confidential treatment be accorded certain portions of General Foods Corporation's reports of compliance.

The Commission has determined that confidential treatment be accorded Exhibit VII 3(b) and 4 of the document dated July 5, 1968, entitled "Memorandum on Divestiture of S.O.S. Business by General Foods Corporation." The Commission has also granted confidential treatment with regard to the information contained in the report of May 27, 1968, entitled "The S.O.S. Business" as well as to the information contained in the document dated June 3, 1968, entitled "The S.O.S. Business - Addendum to May 27, 1968 Report." Finally, the Commission has determined that confidential treatment is to be accorded the dollar amount of the bids received by General Foods for the S.O.S. assets, which amounts were submitted to the Commission on July 8, 1968, in a document entitled "S.O.S. Offers at July 8, 1968."

By direction of the Commission.

Joseph W. Shea,
Secretary.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of STERLING DRUG INC., a corporation.	DOCKET NO. 8797

COMPLAINT

The Federal Trade Commission has reason to believe that Sterling Drug Inc., a corporation and the respondent herein, has merged with Lehn & Fink Products Corporation, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18); therefore, pursuant to Section 11 of the Clayton Act, as amended (15 U.S.C. 21), it issues this Complaint, stating its charges in that respect as follows:

I. Definitions

1. For purposes of this complaint, the following definitions are applicable:

(a) Proprietary Drugs - pharmaceutical preparations advertised to the public;

(b) Personal Care Products - perfumes, cosmetics, and other toilet preparations advertised to the public;

(c) Health and Beauty Aids - all products which are either proprietary drugs or personal care products, as defined above;

(d) Household Aerosol Deodorizers - products in aerosol form which are designed to purify air in the household by removing odors or destroying germs; and

(e) Nonfood Household Consumer Products - chemically-based products which are advertised to the public and used in the household, including health and beauty aids, household aerosol deodorizers, soaps and detergents, and a variety of cleaning and maintenance products.

II. Respondent

2. Respondent, Sterling Drug Inc., is now, and was at the time of the subject merger, a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 90 Park Avenue, New York, New York, 10016.

3. In calendar 1965, the last full calendar year prior to the subject merger, respondent had net sales of $303,300,000 and was the 228th largest industrial corporation in the United States. On December 31, 1965, respondent's assets amounted to $221,175,000. During the ten-year period 1956 through 1965, respondent increased its sales by over 70% and its assets by more than 56%.

4. Respondent is now, and was at the time of the subject merger, engaged in the manufacture and sale of a broad range of health and beauty aid products. In calendar 1965, respondent's health and beauty aid sales amounted to approximately $90 million and accounted for approximately 45% of respondent's total domestic sales in that year.

5. At the time of the subject merger, respondent's health and beauty aids business included many nationally known brands which are leaders in their respective fields. The following is a partial list of respondent's well-known brands: "Bayer" aspirin, "Phillips'" milk of magnesia, "Campho-Phenique" external antiseptic, "Cope" and "Vanquish" pain relievers, "Dr. Lyon's" tooth powder, "Z.B.T." baby powder, "Phisohex" skin cleanser, and "Phisoac" acne aid.

6. Respondent is highly successful in achieving and maintaining brand allegiance toward its health and beauty aid products through the use of extensive advertising.

Respondent's advertising expenditures are very substantial, both in absolute amount and in proportion to respondent's health and beauty aid sales. In calendar 1965 respondent spent approximately $31 million for all media advertising and was the 36th largest advertiser in the United States. For respondent's four largest selling products in that year, all of which were health and beauty aid products, advertising expenditures averaged approximately 25% of net sales.

7. The majority of respondent's advertising budget is directed toward network television. In calendar 1965 respondent spent approximately $18 million for network television advertising and was the 16th largest network television advertiser for that year.

8. Respondent markets its health and beauty aid products through its own national sales organization, which is divided into regions and districts and sells on a direct basis to wholesale and retail food, drug, department, variety and mass-merchandise outlets.

9. Respondent engages in a continuous research and development program in building for its near-term and long-terms future in the health and beauty aid field. Like its product lines, respondent's research is highly diversified and is directed not only toward the development of new products but toward maintaining the brand allegiance of existing products.

10. In addition to its health and beauty aids business, respondent is engaged in the manufacture and sale of a number of other nonfood household consumer product lines, most of which it entered through acquisition. The brands acquired include the following: "Glis" spray starch, "Jato" spray cleaner, "Glisade" fabric finish, "Down-the Drain" drain cleaner, and "d-Con" insecticides and rodenticides.

11. At all times relevant herein, respondent has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended.

III. Lehn & Fink Products Corporation

12. Prior to the subject merger, Lehn & Fink Products Corporation ("Lehn & Fink") was a corporation organized and existing under the laws of the State of Delaware with its principal offices located at 445 Park Avenue, New York, New York, 10022.

13. Lehn & Fink was engaged principally in the manufacture and sale of a broad range of health and beauty aids, household deodorizers, and other nonfood household consumer products.

14. For the fiscal year ending June 30, 1965, the twelve-month period immediately preceding the subject merger, Lehn & Fink had net sales of $66,702,978. As of June 30, 1965, Lehn & Fink's assets amounted to $28,291,522. During the ten-year period 1956 through 1965, Lehn & Fink increased its sales by over 125% and its assets by approximately 117%.

15. At the time of the subject merger, Lehn & Fink's health and beauty aids business included many nationally-known brands, some of which were leaders in their respective fields. The following is a partial list of Lehn & Fink's well-known brands: "Medi-Quick" antiseptic products, "Stri-Dex" medicated products, "Dorothy Gray" and "Tussy" cosmetics, and "Noreen" and "Ogilvie" hair preparations.

16. Lehn & Fink was achieving and maintaining brand allegiance toward its health and beauty aids and other nonfood household consumer products through the use of extensive advertising. For the fiscal year ending June 30, 1965, Lehn & Fink spent approximately $12 million for all media advertising and was approximately the 102nd largest advertiser in the United States. For Lehn & Fink's five largest selling products in that year, three of which were health and beauty aid products, advertising expenditures averaged approximately 22% of net sales.

17. Lehn & Fink marketed its health and beauty aid products through its own national sales organization, supplemented in some instances by the use of brokers. Lehn & Fink's sales organization sold on a direct basis to wholesale and retail food, drug, department, variety, and mass-merchandise outlets.

18. Lehn & Fink's rapid growth in the ten-year period preceding the subject merger is attributable, in large part, to its diversified program of product research and development, which resulted in the successful introduction of a number of important new health and beauty aid products. These products include "Medi-Quick" antiseptic products, "Stri-Dex" medicated products, and various cosmetics and hair preparations.

19. Lehn & Fink was the leading firm in the national household aerosol deodorizer market. The company introduced its "Lysol" brand spray disinfectant-deodorizer in 1962 and, at the time of the subject merger, had captured 36% of the market. By August of 1968, approximately two years after Lehn & Fink was merged into Sterling, "Lysol's" market share had increased to 42%.

20. At all times relevant herein, Lehn & Fink has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act, as amended.

IV. The Merger

21. On or about June 28, 1966, Lehn & Fink was merged into respondent via an exchange of stock, pursuant to which Lehn & Fink stockholders received one share of a new preferred stock of respondent, convertible into 1 1/4 shares of common and callable at $55 a share after five years, in exchange for each share of Lehn & Fink stock.

V. The Nature of Trade and Commerce

A. The General Market--Health and Beauty Aid Products

22. In terms of Standard Industrial Classification categories, the health and beauty aid market is found wholly within Major Group 28--"Chemicals and Allied Products." Every product contained within the market falls into either Industry No. 2834--"Pharmaceutical Preparations" or 2844--"Perfumes, Cosmetics, and Other Toilet Preparations." The market consists of all products in those two industries which are promoted directly to the consumer.

23. Health and beauty aid products are generally pre-sold to the consumer through extensive advertising and promotion and are then purchased by the consumer primarily in retail food, drug, department, and mass-merchandise outlets. In comparison with the total range of products purchased by the typical household, these products are relatively low in price and relatively high in rate of turnover.

24. The health and beauty aid market is rapidly expanding. During the period 1947 through 1966 the dollar value of total shipments increased from approximately $710 million to approximately $3.5 billion. Together, respondent and Lehn & Fink accounted for approximately 3.5% of this total market.

25. The health and beauty aid market is characterized by an extraordinarily high degree of product differentiation, and the necessity of creating and maintaining consumer brand preference through advertising is a substantial barrier to entry into the market. A second major barrier to entry is the necessity of obtaining and maintaining widespread distribution through large numbers of retail outlets.

26. In order to successfully manufacture and sell a broad range of health and beauty aid products, a firm must possess the following competitive resources, among others:

(a) A chemically-oriented research and product development department capable of continually introducing new brands and maintaining consumer preference for existing brands;

(b) A financial base large enough to support continuous, substantial advertising expenditures; and

(c) An experienced national sales force capable of obtaining and servicing thousands of food, drug, department, and mass-merchandise outlets.

B. The Primary Submarkets

27. The health and beauty aid market encompasses two primary submarkets: (1) proprietary drugs (pharmaceutical preparations advertised to the public); and (2) personal care products (including perfumes, cosmetics, and other toilet preparations advertised to the public).

28. Each of the submarkets is rapidly expanding. During the period 1947 through 1966 the dollar value of total shipments of proprietary drugs increased from approximately $328 million to approximately $1.1 billion; during the same period, the value of personal care product shipments increased from approximately $381 million to approximately $2.4 billion.

29. All of the statements contained in paragraphs 23, 25 and 26, supra, describing competitive conditions in the health and beauty aid market, are applicable to each of the two submarkets.

30. Virtually all of the leading firms in the health and beauty aid market manufacture and sell products in both of the primary submarkets. Since the same technological resources, advertising abilities, and distribution channels can be applied to, and are necessary for success in, both submarkets, it is logical to expect manufacturers of proprietary drugs to continue to expand into personal care products and, conversely, to expect manufacturers of personal care products to continue to expand into proprietary drugs.

C. Specific Proprietary Drug Product Lines

31. Acne aids and external antiseptics are representative of the products which comprise the proprietary drug submarket. Each of these product lines was highly concentrated prior to the subject merger, as is illustrated by the following tabulation:

Product	Year	Dollar Value of Total Sales	Percent of Total Sales Accounted for By: 4 Largest Companies	8 Largest Companies
Acne Aids	1963	$43 million	61	78
External Antiseptics	1964	$41 million	41	55

32. All of the statements contained in paragraphs 23, 25, and 26 supra, describing competitive conditions in the health and beauty aid market, are applicable to each of these specific product lines.

D. Household Aerosol Deodorizers

33. The household aerosol deodorizer market includes those products in aerosol form which are designed to purify air in the household by removing odors or destroying germs.

34. The manufacture and sale of household aerosol deodorizers is highly concentrated and has been dominated since 1965 by one nationally-known brand, Lehn & Fink's "Lysol" spray disinfectant deodorizer, as is illustrated by the following tabulation:

Year	Dollar Value of Total Sales	Percent of Total Sales Accounted For By: "Lysol"	7 Largest Companies
1965	$62 million	28	88
1966	$73 million	34	88
1967	$77 million	34	84
1968 (8 mos.)	$54 million	41	84

35. Household aerosol deodorizers are pre-sold to the consumer through extensive advertising and are then purchased by the consumer primarily in retail food and drug stores.

VI. The Violations Charged

36. The effect of the merger of Lehn & Fink into respondent has been, or may be, substantially to lessen competition or to tend to create a monopoly in the national health and beauty aid market, in each of the two primary submarkets contained therein, and in certain specific product lines in each of the following ways, among others:

(a) Lehn & Fink has been eliminated as an independent competitive factor in the manufacture and sale of health and beauty aids;

(b) Potential competition between respondent and Lehn & Fink has been eliminated in the manufacture and sale of proprietary drugs and personal care products;

(c) Actual competition between respondent and Lehn & Fink has been eliminated in the manufacture and sale of acne aids and external antiseptics; and

(d) Lehn & Fink's position as the dominant firm in the household deodorizer market has been, or may be, further entrenched to the detriment of actual and potential competition.

37. The merger of Lehn & Fink into respondent, as alleged above, constitutes a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18).

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 7th day of August , A.D., 1969, issues its complaint against said respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 29th day of September, A.D. 1969, at 10 a.m., o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Penna. Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

PROPOSED ORDER

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint.

I.

IT IS ORDERED that respondent Sterling Drug Inc., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within six (6) months from the date of service upon it of this Order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by Sterling Drug Inc. as a result of its merger with Lehn & Fink Products Corporation, together with all additions and improvements thereto, of whatever description.

II.

IT IS FURTHER ORDERED that none of the assets, properties, rights or privileges described in paragraph I of this Order shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Sterling Drug Inc.

III.

IT IS FURTHER ORDERED that, pending divestiture, respondent shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment, or other property or assets of the company to be divested which may impair its present capacity or market value, unless such capacity or value is restored prior to divestiture.

IV.

IT IS FURTHER ORDERED that, pending divestiture, respondent shall cease and desist from acquiring, directly or indirectly, the whole or any part of the stock, share capital, or assets of any concern engaged in the manufacture and sale of health and beauty aids or household deodorizers.

V.

IT IS FURTHER ORDERED that, for a period of ten years from the date of approval by the Federal Trade Commission of the divestiture required by paragraph I of this Order, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the manufacture and sale of health and beauty aids or household deodorizers.

The provisions of paragraphs IV and V, above, shall also apply to any arrangement pursuant to which respondent obtains the market share in whole or in part of any concern engaged in the manufacture of any of the above-mentioned products (a) through such concern discontinuing the manufacture or production of any of said products under its own trade name or labels and thereafter distributing such products under respondent's trade name or labels, or (b) through such concern discontinuing the manufacture of any of said products and thereafter transferring to respondent customer lists or in any other way making available to respondent access to customers or customer accounts.

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days from the date of service of this Order and every sixty (60) days thereafter, submit to the Federal Trade Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this Order.

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment,

or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that respondent shall forthwith distribute a copy of this Order to each of its operating divisions.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 7th day of August , A.D., 1969.

By the Commission.

S E A L

Joseph W. Shea,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of STERLING DRUG INC., a corporation.	Docket No. 8797

ANSWER OF STERLING DRUG INC.

Respondent, Sterling Drug Inc., answers the complaint herein as follows:

1. Respondent denies the statement in the unnumbered introductory paragraph thereof that the Federal Trade Commission has reason to believe that the merger of respondent with Lehn & Fink Products Corporation (hereinafter Lehn & Fink) on June 28, 1966, was in violation of Section 7 of the Clayton Act, as amended; and avers that, after serving on April 11, 1968, a proposed complaint challenging this acquisition, the Commission on July 11, 1968, affirmatively approved a substantially identical diversification merger between one of respondent's principal competitors and a corporation similarly situated to Lehn & Fink; that the Commission, after investigation, has in effect approved other comparable diversification acquisitions made by various competitors of respondent both before and since its acquisition of Lehn & Fink; and that the filing of the complaint herein on August 18, 1969, the maintenance of this proceeding, and the relief sought, are arbitrary,

capricious and discriminatory, and constitute an unlawful and unconstitutional exercise of the Commission's statutory powers.

2. Respondent denies that the definitions set forth in paragraph 1 of the complaint, or any of them, define any relevant line of commerce or product market.

3. Respondent admits the allegations of paragraph 2.

4. Respondent admits that its consolidated net sales, both domestic and foreign, of all products and services, totaled $303,300,000 in the calendar year 1965; that its combined domestic and foreign assets amounted to $221,175,000 as of December 31, 1965; and that from 1956 through 1965 respondent's consolidated net sales increased by approximately 70% and its assets by approximately 56%. Respondent is without knowledge of the truth of, and therefore denies, the remaining allegations of paragraph 3.

5. Respondent denies the allegations of paragraph 4, and avers that in 1965 its principal business was the manufacture and sale of specific proprietary and ethical medicinal preparations, and that sales of such products, both foreign and domestic, constituted 84% of respondent's total sales in 1965.

6. Respondent denies the allegations of paragraph 5, except admits that its analgesic products include Bayer aspirin, Cope and Vanquish; its antacid and/or laxative products include Phillips Milk of Magnesia; and its other products include :

Dr. Lyon's Tooth Powder, Campho-Phenique, Z.B.T. Baby Powder, pHisoHex skin cleanser and pHisoAc acne aid.

7. Respondent denies the allegations of paragraph 6, and avers that the $31,000,000, alleged as its advertising expenditures in all media in 1965 includes expenditures for products not covered in said paragraph. Respondent is without knowledge as to the truth of, and therefore denies, the allegation that it was the 36th largest advertiser in the United States in 1965.

8. Respondent admits the allegations of paragraph 7 that the majority of its advertising budget is directed toward network television, and that in calendar 1965 respondent spent approximately $18,000,000 for network television. Respondent is without knowledge as to the truth of, and therefore denies, the allegation that it was the 16th largest network television advertiser in 1965.

9. Respondent denies the allegations of paragraph 8, and avers that each of its divisions and subsidiaries has separate and independent marketing organizations, and sales and distribution personnel and policies.

10. Respondent denies the allegations of paragraph 9, and avers that its research and development program is medically oriented, and designed for and chiefly devoted to development and improvement of prescription drugs.

11. Respondent denies the allegations of paragraph 10, except admits that it acquired the products specified in the second sentence of paragraph 10.

12. Respondent admits the allegations of paragraph 11 and paragraph 12.

13. Respondent denies the allegations of paragraph 13, except admits and avers that Lehn & Fink, through the several divisions of its Consumer Products Group, manufactured and/or sold specific disinfectants, floor care products, toiletries, cosmetics and a few medicated products.

14. Respondent denies the allegations of paragraph 14, except admits that Lehn & Fink's total net sales, both domestic and foreign, of all products and services, were $66,702,978 for the fiscal year ending June 30, 1965, and that its total domestic and foreign assets as of such date amounted to $28,291,522.

15. Respondent denies the allegations of paragraph 15, except admits that Lehn & Fink's business included the sale of Medi-Quik, an external antiseptic pain reliever, Stri-Dex Medicated Pads, Dorothy Gray and Tussy cosmetics, Noreen hair coloring and Ogilvie hair preparations.

16. Respondent denies the allegations of paragraph 16, except admits that Lehn & Fink spent approximately $12,000,000 for all media advertising in 1965. Respondent is without knowledge as to the truth of, and therefore denies, the allegation that Lehn & Fink was approximately the 102nd largest advertiser in the United States.

17. Respondent denies the allegations of paragraph 17, and avers that the several divisions of Lehn & Fink had and have separate and independent marketing organizations, and sales and distribution personnel and policies.

18. Respondent denies the allegations of paragraph 18.

19. Respondent denies the allegations of paragraph 19, except admits that "Lysol" brand spray disinfectant-deodorizer was introduced in 1962.

20. Respondent admits the allegations of paragraph 20 and 21.

21. Respondent denies the allegations of paragraph 22 through 37.

FIRST AFFIRMATIVE DEFENSE

22. Shortly after serving upon respondent, on April 11, 1968, a proposed complaint pursuant to Subpart C of the Commission's Rules of Practice, the Commission, in F.T.C. Docket No. 8600, affirmatively approved, on July 11, 1968, the acquisition of The S.O.S. Company by Miles Laboratories, Inc. (hereinafter Miles), which acquisition was a diversification by Miles comparable in all material respects to the diversification achieved by respondent through the acquisition of Lehn & Fink.

23. Miles is one of respondent's principal competitors in the analgesic market. As of the dates of the respective mergers, the two companies were virtually identical in terms

of domestic sales of proprietary medicines and household consumer products; in terms of distribution and sales of their respective leading products, Alka-Seltzer and Bayer aspirin; in terms of market share in the analgesic business; in terms of advertising policies and expenditures; and in terms of domestic assets.

24. Miles, like respondent, is primarily a manufacturer of proprietary and ethical medicinal preparations; the price paid for the two acquisitions was approximately the same; the acquisitions represented the first significant diversifications into the sale of non-medical household consumer products for both Miles and respondent; and the acquired companies were comparable in terms of sales and advertising expenditures, while in terms of market position, The S.O.S. Company had a substantially greater share of its product market than did Lehn & Fink.

25. The Commission's approval of Miles' acquisition of The S.O.S. Company was based upon determinations inconsistent with the allegations of this complaint and demonstrates that the probable effects of the subject merger are not anti-competitive within the meaning of Section 7 of the Clayton Act, as amended.

SECOND AFFIRMATIVE DEFENSE

26. Respondent repeats and realleges the averments of paragraphs 22 through 25 hereof.

27. Having been notified that respondent considered that the express approval of the Miles-S.O.S. acquisition required the closing of the present matter without further action, the Commission abandoned the aforementioned proposed complaint and instead filed on August 18, 1969, the complaint herein alleging facts and theories of law which had previously been investigated and rejected by the Commission.

28. The Commission's action herein is arbitrary, capricious, and discriminatory, and constitutes an unlawful and unconstitutional exercise of the Commission's statutory powers.

WHEREFORE, respondent prays for the issuance of an order denying all relief under the complaint and dismissing the complaint.

Dated: November 3, 1969

BERGSON, BORKLAND, MARGOLIS & ADLER

By_____

ROGERS, HOGE & HILLS

By_____

Of Counsel:

James H. Luther, Esquire
Sterling Drug Inc.
90 Park Avenue
New York, New York

[EXCERPTS FROM HEARING EXAMINER'S]
ORDER DENYING MOTION FOR PRODUCTION OF RECORDS
OF FEDERAL TRADE COMMISSION - JANUARY 14, 1970

On December 2, 1969, respondent filed a Motion For Issuance of a Subpoena Requiring Production and Disclosure of Records of the Federal Trade Commission.

* * *

Respondent argues in its motion that (1) "This application complies with the criteria set forth in the Commission Rules", and (2) "The Freedom of Information Act and Commission Policy also require the disclosure of the requested documents."

* * *

It was the hearing examiner's purpose at the prehearing conference in directing complaint counsel's attention to respondent's affirmative defenses to determine what issues, if any, were raised thereby that could properly be considered and decided by the examiner during the course of the hearing to be held before him. Neither the discussion at the prehearing conference nor the papers filed by the parties relative to this motion assist the examiner in this respect. The examiner has carefully considered both of respondent's affirmative defenses and is unable to find any factual or legal issues raised thereby that can properly be considered by him in any hearings to be conducted in this matter. Both defenses raise questions based upon previous action taken by the Commission. The first affirmative defense relates to the Commission's approval of the sale by General Foods of S.O.S. to Miles and the second defense relates to activities of the Commission and its staff prior to the formal issuance of the complaint presently before the examiner. The hearing examiner's authority does not extend to either of these matters, but is restricted to deciding in the first instance the factual and legal issues raised by the complaint and making a determination as to whether or not the facts as found by him constitute a violation of law which decision is then subject to review by the Commission. At this stage of the proceeding, no final action has been taken by the Commission and it is possible that ultimately no violation of law may be found.

Until there is some final action by the Commission on the merits of the complaint adverse to respondent, both of respondent's affirmative defenses are premature and asserted in the wrong forum. Accordingly, the examiner

takes the position that respondent's affirmative defenses raise no legal or factual issues for determination by the examiner and upon his own motion strikes them from respondent's answer without prejudice to their assertion at the proper time and in the proper forum. 1/ Having made this determination, it is unnecessary to consider the merits of respondent's motion for the production of Commission records which form the factual basis for such affirmative defenses.

Accordingly, IT IS ORDERED:

1) That respondent's motion for issuance of a subpoena requiring production and disclosure of records of the Federal Trade Commission be, and the same hereby is, denied.

* * *

1/ The affirmative averments contained in paragraph 1 of respondent's answer and the relief sought therein similarly pertain to previous Commission action and raise no legal or factual issues for determination by the examiner. Upon his own motion the examiner strikes that portion of paragraph 1 of respondent's answer appearing after the first semicolon.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Caspar W. Weinberger, Chairman
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter of	DOCKET NO. 8797
STERLING DRUG INC., a corporation	ORDER DENYING APPLICATION FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

Upon consideration of the Application for Permission to Appeal from the hearing examiner's order of January 14, 1970, filed by respondent on January 23, 1970, and for the reasons stated in the accompanying opinion,

IT IS ORDERED that the Application for Permission to Appeal be, and it hereby is, denied, without the concurrence of Commissioner MacIntyre.

By the Commission.

S E A L

Joseph W. Shea
Secretary

ISSUED: February 12, 1970

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Caspar W. Weinberger, Chairman
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter of STERLING DRUG INC., a corporation	DOCKET NO. 8797

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's application, filed January 23, 1970, for permission to file an interlocutory appeal from a ruling of the hearing examiner. This application was filed pursuant to Section 3.23(a) of the Commission's Rules of Practice for adjudicative proceedings. Respondent seeks to appeal the hearing examiner's order of January 14, 1970, in which the examiner, on his own motion, struck two "affirmative defenses" from respondent's answer and, on the basis of such action, further denied respondent's motion for the issuance of a subpoena seeking documents pertaining to the stricken defenses. Although not required by the Commission's rules, a response to respondent's application was filed by complaint counsel on January 26, 1970.

Section 3.23(a) of the Commission's Rules of Practice requires that any request for permission to file an interlocutory appeal from a ruling of a hearing examiner shall be filed within five days after notice of the ruling. Permission will not be

granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

Respondent's application fails to make the showing required by § 3.23. The hearing examiner is responsible for framing the issues to be tried and permitting discovery based upon those issues. At present, the examiner is in the process of defining and delineating the issues prior to discovery. By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS.

At this juncture, respondent has not satisfied the requirements for permission to file an interlocutory appeal. Accordingly, respondent's application for permission to appeal is denied. An appropriate order accompanies this opinion.

February 12, 1970

[EXCERPT FROM HEARING EXAMINER'S] ORDER
SETTING FORTH THE CONTESTED ISSUES OF
LAW AND FACT AND SUSTAINING OBJECTION
TO REQUEST FOR ADMISSIONS - MARCH 19, 1970

* * *

. . . the Commission made it abundantly clear in its Order of February 12, 1970, denying respondent's application for permission to file an interlocutory appeal that "nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS" [emphasis supplied]. It is clear therefore that respondent may, in the course of its arguments and briefs, submitted to both the examiner and the Commission in this matter, use the Miles-SOS decision of the Commission as a precedent.

* * *

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Caspar W. Weinberger, Chairman
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter of	DOCKET NO. 8797
STERLING DRUG INC., a corporation	ORDER DENYING APPLICATION FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's application, filed March 30, 1970, for permission to file an interlocutory appeal from an order of the hearing examiner. The examiner's order, dated March 19, 1970, delineated the contested issues of fact and law in this proceeding and sustained an objection to respondent's request for admissions. The examiner's actions are in accord with the Commission's previous order of February 12, 1970. The issue in this proceeding is whether respondent has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the Miles-SOS acquisition. The respondent, therefore, is not entitled to discovery pertaining to the Commission's records or actions in that matter. Respondent fails to make the showing required under Section 3.23(a) of the Commission's rules for permission to file an interlocutory appeal. Accordingly,

IT IS ORDERED that the Application for Permission to Appeal be, and it hereby is, denied.

By the Commission, without the concurrence of Commissioner Dixon and Commissioner MacIntyre who would have granted respondent's application for permission to appeal.

S E A L

Joseph W. Shea
Secretary

ISSUED: April 16, 1970

COMPLAINT FOR INJUNCTION

July 7, 1970

1. Plaintiff, by its attorneys, brings this action to enjoin the defendants from improperly withholding certain documents from inspection and copying by plaintiff, or, in the alternative to enjoin the prosecution of a Federal Trade Commission Complaint issued by defendants against the plaintiff. As more particularly alleged, plaintiff bases its action on defendants' arbitrary, capricious and discriminatory acts in violation of the Administrative Procedure Act (5 U.S.C. §551 et seq.), including the Freedom of Information Act (5 U.S.C. §552(a)(3)).

PARTIES

2. Plaintiff, Sterling Drug Inc., ("Sterling" hereinafter), is a corporation existing and doing business under the laws of the State of Delaware. Its principal offices are located at 90 Park Avenue, New York, New York 10016. Sterling is engaged, among other things, in the manufacture, distribution and sale of drug products, household consumer products and cosmetics throughout the United States.

3. Defendant, Federal Trade Commission, is an agency of the United States which was created by, and exists pursuant to, the Federal Trade Commission Act (15 U.S.C. §41), and possesses those powers established and provided by the Act. Defendants Weinberger, Dixon, Elman, MacIntyre and Jones are Commissioners of the Commission and are sued collectively in

such capacity. The Commission and the aforesaid Commissioners are hereinafter referred to as the "Commission" or "FTC".

JURISDICTION AND VENUE

4. The jurisdiction of this Court is founded upon 5 U.S.C. §552(a)(3), §§701-706, 28 U.S.C. §§1331, 1337, 1361, 1651, and D.C. Code §11-521 (1967 ed.). Venue properly lies in this Court under the provisions of 28 U.S.C. §1391(e). The amount in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs.

FIRST CLAIM

5. On June 28, 1966, plaintiff Sterling acquired, pursuant to an exchange of stock, Lehn & Fink Products Corporation ("Lehn & Fink" hereinafter), whose principal product was Lysol brand disinfectant and deodorizer, sold in liquid and aerosol forms. The acquisition represented Sterling's first significant diversification into the non-food household consumer products.

6. On April 12, 1968, pursuant to Rule 2.31 of the FTC's Rules of Practice, and with a view toward possible disposition of the matter by consent decree, defendant FTC served upon plaintiff a proposed complaint challenging plaintiff's acquisition of Lehn & Fink as violative of Section 7 of the Clayton Act, as amended (15 U.S.C. §18). (This complaint is attached hereto as Exhibit A). The proposed complaint, issued after two years of investigation in which plaintiff complied fully with all requests for documents and information, was based

solely on alleged lessening of competition in the household liquid and aerosol disinfectant and deodorizer markets in which Lehn & Fink was doing business but in which plaintiff was not engaged. The proposed complaint sought divestiture by plaintiff of Lehn & Fink and other relief.

7. On July 12, 1968, while the proposed complaint against plaintiff was outstanding, defendants unconditionally approved a similar acquisition by one of plaintiff's principal proprietary drug competitors. In FTC Docket No. 8600, General Foods Corporation had been ordered to divest the business of The S.O.S. Company ("S.O.S." hereinafter), manufacturer of S.O.S. scouring pads. Such divestiture was to be subject to approval by the FTC. Miles Laboratories, Inc., a competitor of plaintiff Sterling, applied for FTC approval as purchaser of the S.O.S. business and by decision dated July 12, 1968, the FTC granted such approval. (A copy of the decision is attached hereto as Exhibit B).

8. The FTC's decision approving the Miles-S.O.S. acquisition did not specify the basis or reasons for such approval other than the statement that "The Commission has entirely relied upon the information submitted by General Foods. . . ." (Exhibit B). Under the FTC Rules of Practice then in effect, such information submitted by way of a Report of Compliance would become public after acceptance thereof "unless at the time a report of compliance . . . was filed" it was accompanied by a request for confidential treatment (FTC Rules of Practice, July 1, 1967, §4.9(f)).

9. The acquisition of Lehn & Fink by plaintiff and the acquisition of S.O.S. by Miles are strikingly similar. S.O.S., like Lehn & Fink, is a manufacturer of non-food household consumer products. Miles is one of the plaintiff's most significant competitors in its basic business--the analgesic or pain reliever market. Miles' Alka-Seltzer is a direct competitor of plaintiff Sterling's Bayer Aspirin, each having approximately 15% of the market. Miles' marketing techniques and practices are virtually identical to those employed by plaintiff, and their total U.S. assets and advertising expenditures are closely comparable. Miles, like plaintiff Sterling, is primarily a drug manufacturer. The purchase price paid by Miles for S.O.S. was $55,000,000, approximately the price paid by plaintiff for Lehn & Fink. For both Miles and plaintiff, these acquisitions represented the first significant diversification into the household consumer products field. Total sales of the acquired companies in their respective principal products were comparable; advertising expenditures were substantially the same; and S.O.S.'s share of its market was substantially higher than Lehn & Fink's share of its market.

10. The FTC approval of the Miles-S.O.S. acquisition required a determination by the FTC that such acquisition did not violate Section 7 of the Clayton Act. Unable to perceive any significant legal difference between its acquisition of Lehn & Fink, and the Miles-S.O.S. acquisition, plaintiff, on September 12, 1968, petitioned the FTC to close its file with respect to the proposed complaint and requested a hearing on the petition.

11. On November 29, 1968, the FTC accorded confidential treatment to extensive information which had been filed by General Foods Corporation prior to the July 12, 1968 approval action by the FTC. The request for confidential treatment was not filed with the report of compliance, as required by the FTC Rules of Practice, or even prior to the FTC's approval of the Miles-S.O.S. acquisition on July 12, 1968. Rather, the FTC acted pursuant to a letter request dated October 25, 1968, some six weeks after Sterling's petition to close the case was filed. (The FTC's determination to accord confidential treatment is attached hereto as Exhibit C).

12. On December 2, 1968, three days after its decision declaring confidential information pertaining to the Miles-S.O.S. acquisition, the FTC notified plaintiff that its petition to close the file and request for hearing were denied. No reason was given for the FTC's action.

13. Subsequently, the FTC issued a formal complaint against plaintiff, in a proceeding identified as FTC Docket No. 8797, alleging that the acquisition of Lehn & Fink violated Section 7 of the Clayton Act. (A copy of the complaint is attached hereto as Exhibit D). The formal complaint differs radically from the prior proposed complaint in that it relies upon three theories of violation not asserted in the proposed complaint, i.e., alleged anticompetitive effects in (a) the manufacture and sale of "health and beauty aids", (b) the manufacture of "proprietary drugs and personal care products", and (c) the

manufacture and sale of "acne aids and external antiseptics". As a fourth theory of violation related to Lysol products, Lehn & Fink's principal business, the formal complaint alleges:

> "Lehn & Fink's position as the dominant firm in the household deodorizer market has been, or may be further entrenched to the detriment of actual and potential competition."

14. In light of the aforementioned circumstances, plaintiff's answer in FTC Docket No. 8797, which was filed on November 3, 1969, set forth two affirmative defenses. The first alleged that the Commission's approval of the sale of S.O.S. to Miles was based upon determinations inconsistent with the allegations of the complaint issued against plaintiff and demonstrates that the probable effects of the subject merger are not anticompetitive within the proscriptions of Section 7 of the Clayton Act, as amended. The second alleged that the issuance of the complaint by the FTC in Docket No. 8797, after abandoning the earlier and different proposed complaint, represents an attempt to avoid the consequences of the FTC approval of the Miles-S.O.S. acquisition, is arbitrary and capricious, and constitutes an unlawful and unconstitutional exercise of the Commission's statutory powers. (Plaintiff's answer to the FTC complaint is attached as Exhibit E).

15. On December 2, 1969, plaintiff filed with the defendant FTC a Motion for Issuance of a Subpoena Requiring Production and Disclosure of Records of the Federal Trade Commission. Plaintiff, in so doing, sought to obtain the FTC records which

constitute or describe the basis for the FTC's approval of the Miles-S.O.S. acquisition, and other material documents. Plaintiff's request was grounded on the FTC Rules of Practice (Rules 3.61(e), 4.9 and 4.11), and on the Freedom of Information Act (5 U.S.C. §552). The documents sought were identified in specifications which are appended to this complaint as Exhibit F.

16. By order dated January 14, 1970, the FTC Hearing Examiner, to whom plaintiff's motion was presented, after affording FTC counsel an opportunity to move to strike, which they declined, acting sua sponte and without notice or hearing, struck plaintiff's aforementioned two affirmative defenses on the ground that he had no authority to consider the legal and factual issues raised thereby. He then denied plaintiff's motion for production of records, indicating that since the requested documents related to the two affirmative defenses which had been stricken from the case, the documents were no longer relevant to any of the issues in the case.

17. On February 12, 1970, the Commission, without the concurrence of Commissioner MacIntyre, denied plaintiff's application to file an interlocutory appeal from the Hearing Examiner's order of January 14, 1970 (the opinion is attached hereto as Exhibit G). The Commission stated, in part:

> "By striking respondent's 'affirmative defenses' as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of S.O.S."

18. On February 20, 1970, the Hearing Examiner ordered plaintiff and FTC counsel supporting the complaint to submit a joint statement of the contested issues of law and fact. Relying on the Commission's opinion of February 12, 1970, plaintiff proposed to include in the statement contested issues of law and fact dealing with the similarities between the Miles-S.O.S. acquisition and its acquisition of Lehn & Fink. Plaintiff also requested admissions relating to the Miles-S.O.S. matter.

19. On March 19, 1970, the Hearing Examiner entered an order limiting the contested issues of law and fact to those raised by the complaint. He also denied plaintiff's request for admissions relating to the similarities between plaintiff's acquisition of Lehn & Fink and Miles' acquisition of S.O.S., and stated at the pretrial conference held on March 17, 1970, that his order precluded renewal of plaintiff's motion to subpoena the documents which formed the basis of the FTC's approval of Miles' acquisition of S.O.S.

20. On April 16, 1970, the Commission, without the concurrence of Commissioners Dixon and MacIntyre, denied plaintiff's application for permission to file an interlocutory appeal from the Hearing Examiner's order of March 19, 1970. In the accompanying opinion (attached hereto as Exhibit H). the Commission stated:

> "The issue in this proceeding is whether respondent has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the Miles-SOS acquisition. The respondent, therefore, is not entitled

to discovery pertaining to the Commission's records or actions in that matter."

21. Considering these rulings together, while in the first opinion the Commission properly took the position that plaintiff is entitled "to argue any point he [plaintiff] wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS", by its later opinion and order it has denied plaintiff access to relevant and material information by which it could make an effective presentation in support of such arguments and achieve a "full and true disclosure of the facts", 5 U.S.C. §556(d). Such arguments, and the evidence in support thereof, are highly material and relevant to plaintiff's defense in the adjudicatory hearing in FTC Docket No. 8797, "In The Matter of Sterling Drug Inc.".

22. The Commission's actions violate the provisions of the Administrative Procedure Act that parties are entitled to present arguments, and evidence in support thereof, on material and relevant issues, 5 USC §§554(c), 556(d), and constitutes a denial of plaintiff's right to a full and fair hearing in FTC Docket No. 8797.

23. Defendants have improperly prohibited access by plaintiff to (1) all documents relied upon by the FTC in approving Miles' acquisition of S.O.S. or containing the grounds or reasons for such approval, as set forth in paragraph 1 of Exhibit F to this complaint; (2) all FTC documents comparing the Miles-S.O.S. acquisition to, or distinguishing it from,

plaintiff's acquisition of Lehn & Fink, as set forth in paragraph 2 of Exhibit F; and (3) all those documents requested in paragraph 3 of Exhibit F which discuss, distinguish or refer to the Miles-S.O.S. acquisition in relation to the modification of the grounds for challenging the plaintiff's acquisition of Lehn & Fink from those in the original proposed complaint to those in the complaint in Docket No. 8797.

24. This matter is appropriate for determination now. The FTC has asserted its position in unambiguous language. Plaintiff has sought unsuccessfully to obtain, and has exhausted all possible forms of, administrative relief. Plaintiff will be irreparably injured if it is denied the opportunity to obtain and present evidence of similarity and relationship between the Miles-S.O.S. merger and the Sterling-Lehn & Fink merger. Plaintiff does not have an adequate remedy at law by review of an FTC order following the adjudicatory hearing.

SECOND CLAIM

25. The jurisdiction of this Court is founded upon 5 U.S.C. §552(a)(3). This action involves a request for identified records of the FTC which are situated in the District of Columbia.

26. Plaintiff hereby incorporates by reference paragraphs 7-20 of this complaint.

27. In its Motion for Issuance of a Subpoena Requiring Production and Disclosure of Records of the Federal Trade Commission, and in its application to the Commission for per-

mission to file an interlocutory appeal, referred to in paragraphs 12 and 14 hereof, plaintiff based its request on the Freedom of Information Act, 5 U.S.C. §552. These records were specifically identified in the specifications attached hereto as Exhibit F.

28. The FTC Hearing Examiner and the Commission did not specifically discuss plaintiff's claim under the Freedom of Information Act, but their denial of plaintiff's application for documents necessarily constituted a denial of the request under 5 U.S.C. §552(a)(3).

29. This denial of access to FTC records violates the Freedom of Information Act, 5 U.S.C. §552(a)(3).

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

1. Issue an order compelling the FTC to immediately produce the documents set forth in paragraph 23 of this complaint, or, in the alternative,

2. Issue a permanent injunction enjoining and restraining defendant FTC, and all parties acting under its direction and authority, from taking any administrative or other legal action against plaintiff in Docket No. 8797, or which otherwise seeks divestiture by plaintiff of Lehn & Fink, unless and until the defendant FTC produces the documents requested.

3. Grant such other and further relief as to this Court may seem necessary and appropriate.

AFFIDAVIT OF JOSEPH W. SHEA

Joseph W. Shea, being duly sworn, deposes and says as follows:

1. I have served continuously as Secretary of the Federal Trade Commission (hereinafter sometimes referred to as the "Commission") since May 1, 1961. As Secretary, I am the legal custodian of the Commission records. In addition, from time to time, I perform such other duties as may be directed by the Commission.

2. I have read the complaint in the above-captioned action, including Paragraph 23 thereof which specifies the documents contained in the files of the Commission which plaintiff seeks to inspect and copy. I have examined the files of the Commission, and, to the best of my knowledge and belief, the documents hereinafter discussed are the only ones which fall within the specifications of Paragraph 23.

3. The documents specified in Paragraph 23 (1) contain trade secrets and commercial or financial information obtained from third parties and are privileged or confidential and are thus exempt from disclosure under the provisions of 5 U.S.C. §552(b)(4); or (2) are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency, and are thus exempt from disclosure under the provisions of 5 U.S.C. § 552(b)(5); or (3) are exempt under both provisions.

4. The documents which are within the 5 U.S.C. § 552(b)(4) exemption are portions of the report submitted by General Foods Corporation to the Commission showing how General Foods had complied with the Commisison's order to cease and desist issued In the Matter of General Foods Corporation, FTC Docket No. 8600. Such portions are numbered (a) Paragraphs 3(b) and 4 of Exhibit VII of the document dated July 5, 1968, entitled, "Memorandum on Divestiture of S.O.S. Business by General Foods Corporation"; (b) Report of May 27, 1968, entitled, "The S.O.S. Business;" (c) document dated June 3, 1968, entitled, "The S.O.S. Business--Addendum to May 27, 1968 Report"; and (d) the dollar amounts of the bids received by General Foods for the S.O.S. assets contained in a document entitled "S.O.S. Offers at July 8, 1968."

5. By letter dated October 25, 1968, the attorney representing General Foods requested that the Commission classify as confidential the portions of the report of compliance listed in Par. 4 above. It was explained that numbered paragraph 3(b) of Exhibit VII relates to the market shares of certain products of Miles Laboratories and numbered paragraph 4 of that Exhibit relates to products sold between Miles Laboratories and General Foods; and that these items are considered to be trade secrets. The October 25, 1968, letter adopted by reference a prior request for confidential treatment of these items by counsel for Miles Laboratories, Inc., by letter dated October 14, 1968. In that request it was stated that these items contained trade secrets

involving fields unrelated to S.O.S.--the property that was to be acquired by Miles Laboratories. Further, the items set forth vital competitive statistics such as market shares and sales by products, the disclosure of which would adversely affect Miles' ability to compete with aggressive and substantially larger competitors.

6. The letter explained that the Report of May 27, 1968, entitled, "The S.O.S. Business" contains a breakdown of sales and profit data for each S.O.S. product as well as other highly sensitive financial data relative thereto. Similarly, the document dated June 3, 1968, entitled, "The S.O.S. Business--Addendum to May 27, 1968 Report" contains a breakdown of the sales, cost and profit data by product and customer classification. It was explained that public disclosure of this information would be prejudicial to the orderly transfer of S.O.S. to Miles and that Miles would be faced with many competitive problems if these intimate details of the S.O.S. business were made available to competitors who would be under no reciprocal obligation to disclose comparable financial data. Further as disclosed in the public record, both reports, as filed with the Commission, contained on the cover sheet, "The information contained herein is STRICTLY CONFIDENTIAL, and is for the sole use of the person to whom delivered."

7. It was finally explained that the bids for the S.O.S. business were submitted to General Foods on a closed basis and that they had not been disclosed to Miles Laboratories, the

highest bidder, or to any of the other bidders. Therefore, while not objecting to disclosure of the names of all bidders (which are disclosed in the public file), confidentiality was requested as to the amounts of the various bids in order to preserve the confientiality under which these bids were made to General Foods.

8. By minute of November 27, 1968, the Commission granted the confidential treatment requested and, by letter dated November 29, 1968 (a copy of which appears in the public file), the Commission notified counsel for General Foods of this action.

9. The documents which are within the 5 U.S.C. § 552(b)(5) exemption are as follows:

a. A July 9, 1968, memorandum to the Commission from its Compliance Division, Bureau of Restraint of Trade, which constitutes a legal and factual analysis and comments upon General Foods' report of compliance and makes recommendation as to Commission action thereon. In addition, the memorandum recites the amounts of the bids by prospective purchasers of S.O.S. other than Miles, data the enclosure of which is exempted by 5 U.S.C. § 552(b)(4). See Pars. 4 and 7, supra.

b. A July 11, 1968, memorandum to the Commission from its Division of Mergers which constitutes a legal and factual analysis of the Sterling Drug-Lehn and Fink merger and the Miles-S.O.S. proposed merger. Recommendation is made as to Commission action on General Foods' report of compliance.

c. A July 11, 1968, confidential memorandum from the Commission to its staff reflecting internal Commission deliberations, advising that it had received the staff memoranda noted in a. and b. above, advising that it had approved Miles Laboratories as the purchaser of S.O.S., and directing that General Foods be so advised in the form of a letter, a copy of which appears in the public file and is Exhibit B to the plaintiff's complaint.

d. A July 15, 1968, memorandum to the other members of the Commission from Commissioner Jones referring to Sterling's and Miles' acquisitions and to Commission deliberations on General Foods' report of compliance, and recommending that the Commission meet and give further consideration in that matter.

e. A September 24, 1968, memorandum to the Commission from its Bureau of Economics commenting upon and making recommendation relative to Sterling's petition to close the file. Sterling's and Miles' acquisitions are discussed and compared in support of the recommendation. The discussion includes legal, factual and economic analyses, and a policy recommendation is made.

f. October 1, 1968, memorandum to the Commission from its Division of Mergers, Bureau of Restraint of Trade, which refers to and compares Sterling's and Miles' acquisitions and makes recommendations relative to the Commission pursuing its proceeding against Sterling. Again, this con-

stitutes a legal and factual analysis upon which a policy recommendation is made.

g. October 4, 1968, memorandum to the Commission from its Division of Mergers, Bureau of Restraint of Trade, supplementing its October 1, 1968, memorandum, in further support of its recommendation.

h. October 22, 1968, memorandum to Commission from its Division of Consent Orders reporting on negotiations looking toward a consent order with Sterling, referring to previous staff memoranda analyzing and comparing the Sterling and Miles acquisitions, and making recommendation as to disposition of Sterling's "Petition to Close File Without Further Action."

i. November 13, 1968, memorandum from Commissioner Nicholson to the Commission in which he discusses staff recommendations regarding Sterling's petition to close the proceeding, expresses his legal and factual analysis and deliberations in the matter, including a comparison of the Sterling and Miles acquisitions, and makes recommendations as to Commission action.

j. April 16, 1969, memorandum to Commission from its Division of Mergers, Bureau of Restraint of Trade, analyzing the need for certain additional evidence in the proceeding against Sterling and stating its intention to submit a revised complaint for formal issuance, including a different

definition of relevant markets. This constitutes an analysis of legal and factual criteria in the administrative proceeding before the Commission.

k. May 29, 1969, memorandum to Commission from its Division of Mergers reciting problems of proof encountered in proceeding with the case against Sterling which necessitate a delay in issuance of a formal complaint. The Commission is advised as to staff views regarding changing the scope of the complaint to expand the definition of relevant markets affected by the challenged merger. The memorandum indicated the staff's views as to whether the theory of such an expanded complaint would go beyond what was involved in Miles' acquisition of S.O.S. Recommendation is made to the Commission with respect to whether such a revised complaint should issue.

10. Staff recommendations are normally referred to one of the Commissioners chosen on a rotating basis who ordinarily reviews the matter and refers it with his recommendation to the other members of the Commission. Other Commissioners may or may not make another recommendation. The Commission need not accept the recommendation made to it by the staff or the individual Commissioners. The purpose of these recommendations is to facilitate the deliberations of the Commission, not to present a proposed decision to it. Acceptance of a recommendation of either the staff or an individual Commissioner does not necessarily constitute adoption of the analysis and discussion contained in the memorandum. The matter may be orally discussed in

a meeting of the Commission before determination is made. No transcript of the oral deliberation is made. Once the Commission has made its determination, the Secretary or the staff division involved is usually directed to take the appropriate action.

September 11, 1970

/s/ _____
JOSEPH W. SHEA
Secretary
Federal Trade Commission

[EXCERPT FROM]
OPPOSITION OF DEFENDANTS TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

* * *

Subsequently, when the matter was squarely before the Commission, after the examiner had delineated the contested issues of fact and law, the Commission clearly stated its position:

> "The issue in this proceeding is whether [Sterling] has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the Miles-S.O.S. acquisition. [Sterling], therefore, is not entitled to discovery pertaining to the Commission's records or action in that matter." (Pl. Ex. H).

Accordingly, defendants urge there is no basis for Sterling's interpretation of the Commission's opinion dated February 12, 1970, to acknowledge any reason for Sterling to rely on the Commission's approval of the Miles-S.O.S. merger. In any event, even if the Commission were incorrect in its ruling that approval of the Miles-S.O.S. merger is not relevant in the administrative proceeding against Sterling, this is a matter to be reviewed by a Court of Appeals.

* * *

[EXCERPT FROM]
MEMORANDUM OF MILES LABORATORIES, INC. IN SUPPORT OF DEFENDANT FEDERAL TRADE COMMISSION'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE DOCUMENTS IN QUESTION ARE CONFIDENTIAL AND ARE EXEMPT FROM DISCLOSURE [WITH ATTACHMENTS]

* * *

Miles emphasizes that contrary to plaintiff's argument, a request for confidential treatment of the subject material was not made months after submissions but rather was made at the time of submission and Miles was given assurance of confidentiality. See attached letter of Jerrold G. Van Cise, counsel for Miles to the Commission staff wherein Mr. Van Cise states: "I appreciate your assurance that this material will be held confidential in accordance with current Commission procedures." See also attached letter of October 14, 1968 from Mr. Van Cise to the Commission staff.

In Federal Trade Commission Docket No. 8600, General Foods Corporation had been ordered to divest the business of The SOS Company (hereinafter "SOS"). Miles applied for FTC approval as purchaser of SOS and the FTC approved such purchase. In the course of the FTC's approval of Miles as a purchaser, numerous documents were submitted to the FTC by General Foods and by Miles, many of which were considered confidential as

containing vital competitive statistics and for which confidential treatment was expressly requested and granted.* For example, the material submitted by Mr. Van Cise on July 9, 1968 and covered by Mr. Van Cise's above quoted statement as to confidentiality was the "The SOS Business Report of May 27, 1968". There is a section of this Report entitled "Profitability" which contains highly confidential profit information by product. Exhibits to this Report provide details on the various financial components involved in manufacturing and marketing the products. This would be of great value to potential and actual competitors in that it contains warehousing costs, costs of goods, costs of transportation and gross profit. These cost figures are current. Further evidence of the value of this information lies in the fact that Miles plans to modify its distribution network in 1971. Competitors would be able to estimate the decrease in profit resulting from this distribution change and could estimate the attendant decrease in promotional and advertising monies that could be spent without significant threat of competitive response from Miles.

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* Miles submitted information and documents by letter of counsel dated July 9, 1968 and October 14, 1968. It was understood that confidential treatment would be accorded such submissions. Much of the same material was submitted as part of General Foods Final Compliance Report in Docket No. 8600 and was accorded confidential treatment by the Commission (see Defendant's Exhibit C, para. 8, attached to defendant's Motion to Dismiss or, in the Alternative, For Summary Judgment).

Further to elaborate on the confidentiality of documents submitted by Miles, there was forwarded with Mr. Van Cise's letter of July 9, 1968, a document which reviewed the soap pad industry and contained a listing of product suggestions complementary to the SOS acquisition. This material is highly confidential in that certain of the products are presently being developed and premature disclosure would be damaging competitively in introducing such new products.

Additional material submitted by Miles, with the understanding it would be accorded confidential treatment, includes market share information involving numerous Miles products which was obtained by Miles in confidence (see Exhibit VII, paragraph 3B submitted with Compliance Report of General Foods dated July 5, 1968, which was the subject of a request for confidential treatment in a letter to Mr. Janson of the FTC from Mr. Van Cise dated October 14, 1968 as well as in a letter of October 25, 1968 to the FTC from Carson M. Glass, attorney for General Foods Corporation). In addition, there was submitted information on sales by Miles to General Foods, which is also considered highly confidential and is in the nature of trade secret information.

* * *

C O P Y

July 9, 1968

Re: Miles Laboratories - SOS

Dear Mr. Janson:

Pursuant to our telephone conversations of yesterday and today, I am enclosing herewith documents which I believe are responsive to your request. One document, namely that entitled "The SOS Business" is an addendum to a May 27, 1968 report which has previously been submitted to you by General Foods. I appreciate your assurance that this material will be kept confidential in accordance with current Commission procedures.

Very truly yours,

s/

Jerrold G. Van Cise

Mr. Lars Janson
Room 780
Division of Compliance
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C. 20580

C O P Y

October 14, 1968

Re: Miles Laboratories - SOS

Dear Mr. Janson:

In accordance with our telephone conversation of October 9, 1968 I am writing to urge that the information relating to Miles Laboratories set forth in Items 3B and 4 of Exhibit VII submitted with the Compliance Report of General Foods dated July 5, 1968 in the SOS proceeding -- like the materials separately submitted in confidence by us on July 9, 1968 -- be classified as confidential and be withheld from public inspection and copying.

Miles Laboratories is not a party to this proceeding and the subject matter of Items 3B and 4 of Exhibit VII does not relate to the issues raised in the aforesaid proceeding. On the contrary, it contains property in the form of trade secrets involving fields unrelated to SOS. Moreover, it sets forth vital competitive statistics such as market shares and sales, by products, whose disclosure would adversely affect the ability of Miles Laboratories to compete with its very aggressive and substantially larger competitor.

Should there be any doubt of the reasonableness of the foregoing request, it is further requested that a hearing be given to Miles Laboratories at which these issues can be reviewed in further detail.

Very truly yours,

s/

Jerrold G. Van Cise

Mr. Lars Janson
Room 780
Division of Compliance
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C. 20580

O R D E R

Upon consideration of defendant's motion to dismiss the complaint or, in the alternative, for summary judgment and upon consideration of plaintiff's motion for partial summary judgment and upon consideration of the whole record in the case, oral argument having been heard on November 25, 1970, it is by the Court this 4th day of December, 1970,

ORDERED that the defendant's motion for summary judgment is GRANTED, and it is further,

ORDERED that plaintiff's motion for partial summary judgment is DENIED.

/s/ William B. Bryant
JUDGE

O P I N I O N

Plaintiff is a corporation whose principal business is manufacturing, distributing and selling drugs, household consumer products and cosmetics throughout the country. In June 1966 plaintiff acquired Lehn and Fink Products Corporation whose main product was the brand disinfectant and deodorizer known as Lysol. On April 21, 1968, the Federal Trade Commission, defendant herein, served plaintiff with a proposed complaint challenging the Lehn and Fink acquisition as violative of Section 7 of the Clayton Act (15 U.S.C. §18) and seeking divestiture by plaintiff Lehn and Fink.

While the proposed complaint against plaintiff was pending, defendant approved a somewhat similar acquisition by one of plaintiff's principal proprietary drug competitors, Miles Laboratories, Inc. The General Foods Corporation had been ordered to divest the business of S.O.S. Company, manufacturer of S.O.S. scouring pads, and such divestiture was to be subject to approval by the Federal Trade Commission. Miles Laboratories, Inc. applied for Federal Trade Commission approval as purchaser of the S.O.S. business and such approval was granted on July 12, 1968. The Federal Trade Commission decision approving the Miles -- S.O.S. acquisition did not specify the basis or reasons for such approval other than the statement that "the Commission has entirely relied upon the information submitted by General Foods . . ." by way of that company's report of compliance.

On October 25, 1968, General Foods requested that certain material it had submitted to the Commission's compliance division be classified as confidential, and it gave supporting reasons for this request. On November 27, 1968, all the documents submitted pursuant to the divestiture order were filed with the Commission as a report of compliance, and two days later the Commission notified General Foods that confidential treatment would be accorded certain portions of the report.

Meanwhile, in the agency action against plaintiff the parties failed to negotiate a consent order settlement, and on August 7, 1969, the Commisison issued the formal complaint in Docket No. 8797 entitled IN THE MATTER OF STERLING DRUG INC.

Plaintiff's answer, filed on November 3, 1969 contained the specific averment that the Commission had "affirmatively approved a substantially identical diversification merger between one of Sterling Drug's principal competitors and a corporation similarly situated to Lehn and Fink; that the Commission after investigation had in effect approved other comparable diversification acquisitions made by various competitors of Sterling Drug both before and since its acquistion of Lehn and Fink; and that the filing of the complaint here on August 18, 1969, the maintenance of this proceeding, and the relief sought are arbitrary, capricious, discriminatory, and constitute an unlawful and unconstitutional exercise of the Commission's statutory authority."

During the course of the ensuing proceedings the Commission refused a request to produce certain documents, allegedly necessary to the development of Sterling's defense. The specifications attached to the subpoena duces tecum identified the documents as follows:

> 1. (a) All documents containing any findings or reasons of the Federal Trade Commission supporting its approval in Docket 8600 of Miles Laboratories, Inc. as a purchaser of the S.O.S. business from General Foods Corporation.
>
> (b) All documents containing the information submitted by General Foods Corporation which the Commission "entirely relied upon" for its approval of the purchase of S.O.S. by Miles, as stated in the Commission's letter of July 12, 1968 to General Foods Corporation.
>
> (c) All documents, whether relied upon or not, submitted by or on behalf of General Foods Corporation, S.O.S., Miles Laboratories, or any other person interested in purchasing S.O.S. from General Foods, in Compliance Docket 8600, which have not been placed on the public record. These include, but are not limited to, Exhibits VII 3(b) and 4 of the document dated July 5, 1968 entitled "Memorandum on Divestiture of S.O.S. Business by General Foods Corporation"; the report of May 27, 1968, entitled "The S.O.S. Business - Addendum to May 27, 1968 Report"; and the entire document entitled "S.O.S. Offers at July 8, 1968."
>
> (d) All documents prepared by the Federal Trade Commission or any employee thereof analyzing, commenting on, or relating or referring to the Miles acquisition of S.O.S.
>
> 2. All documents prepared by the Federal Trade Commission or any employee thereof comparing the Miles-S.O.S. acquisition to, or distinguishing it from, respondent's acquisition of Lehn & Fink, or comparing or distinguishing any of the companies or markets involved in terms of assets, sales, products, market shares, market positions, research and development, manufacturing, distribution, marketing, advertising, concentration, potential competition, entry barriers, or any other criterion.

> 3. All documents prepared by the Federal Trade Commission or any employee thereof reflecting the Commission's reasons for (a) limiting its original proposed complaint to the grounds asserted therein, or (b) changing the grounds for challenging the subject acquisition from those asserted in its original proposed complaint to those contained in the present complaint.

In the instant action plaintiff seeks an order from this Court requiring the Commission to produce the requested materials or, in the alternative, restraining the defendant from taking any administrative action against it in the agency's pending proceeding unless and until the documents are produced.

Plaintiff rests its claim for relief on two grounds; first that the Commission's rulings constitute a denial of access to relevant and material information which it is entitled to introduce and rely upon in the hearing pursuant to Administrative Producedure Act, 5 U.S.C. §554(c); and second that the Freedom of Information Act provides access to the material, 5 U.S.C. §552(a)(3).

Plaintiff's first ground for relief seems to be insufficient to warrant district court intervention into the orderly progress of an administrative proceeding. After all, the Commission's action constitutes nothing more than an adverse ruling on a request for discovery -- a purely interlocutory procedural matter. In many cases, old and new, it is established as a well settled principle that review of such matters is exclusive with the court of appeals. This is not to say that the district court can never step in to interrupt proceedings at the administrative level,

but such interruptions have always been the exception rather than the rule, and they have always been prompted by patent violations of constitutional or statutory authority. Amos Treat & Co. v. Securities and Exchange Commission, 113 U.S. App. D.C. 100, 306 F.2d 260 (1962). Plaintiff claims that the Commission's action on the discovery request constitutes a denial of plaintiff's right to a full and fair hearing. This may be the fact. But it is also the fact that the same appellate court which might reverse a final adverse agency ruling on this ground would deny a lower federal court's jurisdiction to reach the same determination in an action such as the one brought here. It seems that plaintiff's representations to the Court at the hearing on this aspect of his action are peculiarly suited to proper advocacy in the appellate court in the event of an adverse final decision at the agency level.

Accordingly, plaintiff's first claim for relief is denied for lack of jurisdiction.

The Commission counters plaintiff's second claim of entitlement to production of the documents with the assertion of two exemptions under the Freedom of Information Act, i.e. (1) confidential information obtained from a person and containing trade secrets and commercial or financial information (5 U.S.C. §552(b)(4); and/or (2) intra-agency memorandums not available to a party (5 U.S.C. § 552(b)(5); and it has submitted all of the disputed items for the Court's in camera inspection.

The allegedly confidential documents are portions of the General Foods compliance report which had been so classified pursuant to that company's request, and these are listed and described as follows:

1. Numbered paragraphs 3(b) and 4 of Exhibit VII of a document dated July 5, 1968 entitled "Memorandums on Divestiture of S.O.S. Business by General Foods Corporation. Paragraph 3(b) indicates the markets shares of certain Miles Laboratory products, i.e. ALKA-SELTZER, ONE-A-DAY, and CHOCKS. Paragraph 4 reflects the dollar amounts of sales of certain products between Miles Laboratories and General Foods.

2. Report dated May 27, 1968, entitled "The S.O.S. Business. This item contains a breakdown of sales and profit data for each S.O.S. product over the ten year period, 1959-1968.

3. Report dated June 3, 1968, entitled "The S.O.S. Business - Index to Exhibits", contains breakdown of sales, cost and profit data by product and customer classification.

4. S.O.S. Offers at July 8, 1968. This item lists the bids submitted to General Foods on a closed basis. The amounts of the various bids -- not the names of the bidders -- were labelled confidential.

It appears from the nature of the above items that the request that they be classified as confidential was justified and that they properly are covered by the exemption accorded trade secrets and sensitive commercial or financial information obtained from a person in order to protect his privacy and competitive position, thus their deletion from the report of compliance by General Foods was proper.

The allegedly exempt internal memoranda are likewise listed and described below.

1. Memorandum to the Commission dated July 9, 1968, from the Chief, Compliance Division, Bureau of Restraint of Trade, re General Foods Corporation, Docket 8600. This contains an analysis and comments on the General Foods' compliance report and makes recommendations to the Commission. Also, it reflects the dollar amounts of the bids by prospective purchasers of S.O.S. which had been classified as confidential.

2. Memorandum to the Commission dated July 11, 1968, from William J. Boyd, Jr., Chief, Division of Mergers, re proposed sale of S.O.S. by General Foods to Miles Laboratories and relationship to Sterling Drug, Inc., File No. 661 0641. This is an analysis of the Sterling Drug -- Lehn and Fink merger and the Miles -- S.O.S. proposed merger, and contains a recommendation as to Commission action on the General Foods report of compliance.

3. Commission memorandum dated July 11, 1968, approving Miles Laboratories, Inc., as purchaser of the S.O.S. busines, etc. This item advises the staff that it (the Commission) had received the above mentioned memoranda, that it had approved the Miles -- S.O.S. merger, and that General Foods should be so advised.

4. Memorandum to the Commission dated July 15, 1968, from Commissioner Jones, in re General Foods Corporation, Docket 8600. This is a memorandum to other Commissioners referring to the Sterling and Miles acquisitions and also to Commission deliberations on General Foods' report of compliance. It also recommends that the Commission meet and further consider the matters.

5. Memorandum to the Commission dated September 24, 1968, from Harrison Houghton, Acting Director, Bureau of Economics, recommending rejection by Commission of the petition to close file without further action in Sterling Drug - Lehn & Fink, File No. 661 0641. This item comments upon and makes a recommendation relative to Sterling's petition to close the file. Both the Sterling and Miles acquisitions are discussed, extensive analyses are included, and a policy recommendation is made.

6. Memorandum to the Commission dated October 1, 1968, from Division of Mergers, Bureau of Restraintof Trade, re results of consent settlement negotiations in File No. 661 0641, Sterling Drug Company. This item refers to

and compares the Sterling and Miles cases and makes recommendations relative to the Commission pursuing its proceeding against Sterling.

7. Memorandum to the Commission dated October 4, 1968, from the Division of Mergers, Bureau of Restraint of Trade re petition to close without further action in Sterling Drug - Lehn & Fink, File No. 661 0641. This is a follow-up to the October 1, 1968 memorandum, and offers additional support for its recommendation to proceed.

8. Memorandum to the Commission dated October 22, 1968, from Division of Consent Orders, re Sterling Drug, Inc. File No. 661 0641. This item reviews the negotiations looking toward a consent order with Sterling Drug, makes extensive reference to previous staff memoranda which analyzed the Sterling and Miles cases, discussed previous recommendations of staff, and makes a recommendation on the disposition of Sterling's "Petition to Close File Without Further Action."

9. Memorandum to the Commission dated November 13, 1968, from Commissioner Nicholson re Sterling Drug - Lehn & Fink merger, File No. 661 0641. Here a commissioner discusses staff recommendations on Sterling's petition to close the proceeding against it, gives an analysis of the pending proceedings in the light of a comparison between the Sterling and Miles dockets, and makes recommendations as to Commission action.

10. Memorandum to the Commission dated April 16, 1969, from Division of Mergers, Bureau of Restraint of Trade in Sterling Drug, Inc., File No. 661 0641. This is an analysis of the need for additional evidence in the agency's case against Sterling, and informs the Commission of the Division's intention to submit a revised complaint as the one for formal issuance.

11. Memorandum to the Commission dated May 29, 1969, from Division of Mergers, Bureau of Restraint of Trade, requesting further deferral of issuance of complaint and expansion of the potential competition theory in Sterling Drug, Inc., File No. 661 0641. This item cites certain problems of proof in prosecuting the matter against Sterling which make necessary a delay in issuance of the formal complaint. Certain staff views on changing the thrust of the complaint and the relationship between the contemplated revised complaint and the Miles -- S.O.S. merger are discussed, and a recommendation is made to the Commission as to whether the revised complaint should issue.

12. November 27, 1968 Commission minute. This directs that petition to close the file be denied, and also that the complaint be issued and served.

13. April 24, 1969 Commission minute. This directs the staff to complete the necessary investigation for issuance of complaint.

14. June 11, 1969 Commission minute. This authorizes thirty-day delay for issuance of complaint, and also that the focus of the complaint be revised in accordance with the staff's recommendation.

Examination of the above listed items leads to the conclusion that they are not "purely factual reports and scientific studies" (Bristol-Myers Company v. Federal Trade Commission, -- U.S. App. D.C. --, --424 F.2d 935, 939 (1970) but are in fact " 'those internal working papers in which opinions are expressed and policies formulated and recommended.' " Bristol - Myers, supra, citing Ackerly v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

Defendant's motion for summary judgment is granted, and plaintiff's motion for partial summary judgment is denied.

December 4, 1970 /s/ William B. Bryant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24878

STERLING DRUG, INC. :
Plaintiff-Appellant :
v. :
FEDERAL TRADE COMMISSION, et al. :
Defendants-Appellees :

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Herbert A. Bergson
Lionel Kestenbaum
Murray J. Belman
Bergson, Borkland, Margolis
& Adler
888 Seventeenth St., N.W.
Washington, D.C. 20006
Attorneys for Appellant

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* Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUES PRESENTED

This case involves the claim by Sterling Drug Inc. to obtain information from the Federal Trade Commission on the grounds that (a) disclosure is required by the Freedom of Information Act, 5 U.S.C. §552; and (b) the information is essential to a fair hearing in a pending case against Sterling and there is no adequate remedy on appeal from a final order.

The issues presented are:

1. Are documents relied upon, in forming a basis for, and explaining an FTC decision approving an acquisition open for public examination pursuant to the Freedom of Information Act to the extent necessary to disclose the basis and rationale of the Commission decision?

2. Can the FTC properly refuse respondent in a merger proceeding access to documents which provide the basis and rationale of the Commission's contemporaneous and unexplained decision in a closely parallel and directly controlling merger case? Does the Commission's refusal to give access in these circumstances constitute a denial of fair hearing giving the district courts jurisdiction to grant appropriate relief?

This case has not previously been before this Court.

REFERENCES TO RULINGS

The Order appealed from and Decision of the District Court, dated December 4, 1970, are found at Appendix, pp. 66 and 67, respectively.

STATUTES AND REGULATION INVOLVED

The relevant statutes and regulations are set out in an Addendum to this brief, pp. la, et seq., infra.

STATEMENT OF THE CASE

1. Nature of the Case

This is a proceeding in which Sterling Drug Inc. seeks access to certain documents in the possession of the Federal Trade Commission. The documents relate to the decision by the Commission approving the acquisition by Miles Laboratories, Inc. of S.O.S., Inc. The Miles-S.O.S. decision was unaccompanied by any reasons;[1/] the documents sought contain the only material that could explain and elucidate the Commission's decision.

Access to the reasoning behind the Miles-S.O.S. decision is critical to Sterling; its acquisition of Lehn & Fink Products Corp., an acquisition strikingly similar to that of S.O.S. by Miles, has been challenged by the Commission.

Sterling has relied upon the Freedom of Information Act, 5 U.S.C. §552 and the Administrative Procedure Act, 5 U.S.C. §551 et seq., in making its requests to the Commission. When these requests were unavailing, Sterling sought relief in the district court. On December 4, 1970, the district court granted the Commission's motion for summary judgment. Sterling appeals from that judgment.

2. Statement of the Facts

A. The FTC's Proposed Complaint Against Sterling

In 1966, Sterling, a diversified drug company, acquired

1/ App., pg. 8.

Lehn & Fink Products Corporation. This represented Sterling's first significant diversification into household consumer products. Lehn & Fink's principal products were liquid and aerosol disinfectants and deodorizers sold under the "Lysol" brand. Its second principal field was cosmetics; and it also produced an acne aid and an external antiseptic product.

After more than two years of investigation, on April 12, 1968, the Federal Trade Commission served upon Sterling a proposed complaint (App., pg. 1) alleging that the acquisition of Lehn & Fink violated Section 7 of the Clayton Act. 15 U.S.C. §18. The complaint was addressed only to the Lysol products, charging a lessening of competition on various grounds in the markets for household liquid and aerosol disinfectants and deodorizers. There were no allegations of anticompetitive consequences with regard to drugs, cosmetics, or any other field (App., pp. 6, 7).

B. The FTC's Miles-S.O.S. Decision

Shortly thereafter, the Commission was presented with an application to approve the Miles-S.O.S. merger. This was in the aftermath of an FTC adjudication that the acquisition of S.O.S. by the General Foods Corporation was unlawful. On May 20, 1968, the Supreme Court denied certiorari from the Third Circuit's affirmance of that Commission decision.[1a/] The case was then remanded to the Commission, and, less than two months later,

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1a/ General Foods Corp. v. FTC, 391 U.S. 919 (1968), denying certiorari from 386 F.2d 936 (3d Cir., 1967).

General Foods submitted its proposal to divest S.O.S. to Miles Laboratories on July 8, 1968. On July 9 and 11, 1968, the Commission received staff memoranda making recommendations with regard to the proposed Miles-S.O.S. acquisition; one of these memoranda presented a legal and factual analysis and comparison of the Sterling Drug-Lehn & Fink acquisition and the proposed Miles-S.O.S. acquisition (App., pg. 55, ¶9(a),(b)). On July 11, 1968, only three days after receiving the General Foods proposal and after considering these memoranda, the Commission approved the acquisition of S.O.S. by Miles Laboratories (App., pg. 56, ¶c). The following day General Foods was advised of this approval by a letter which declared that in taking such action "the Commission has entirely relied upon the information submitted by General Foods..." (App., pg. 8).

The Miles-S.O.S. determination approved the acquisition of a leading household products manufacturer by a diversified drug company which was a direct competitor of Sterling. Sterling believed that this determination was directly relevant to, and dispositive of, the proposed complaint against its acquisition of Lehn & Fink. On September 12, 1968, therefore, Sterling petitioned the Commission to close the file on the proposed complaint against it, and requested a hearing on the petition. Sterling's petition tabulated economic data comparing Miles with Sterling, and S.O.S. with Lehn & Fink's Lysol, in terms of assets, sales, advertising expenditures, market shares, etc., which dis-

closed striking similarities.[2/] It pointed out that Miles' principal product, Alka-Seltzer, was a head-to-head competitor of Sterling's principal product, Bayer Aspirin; Miles' marketing techniques and advertising practices were virtually identical to those employed by Sterling; the purchase price paid by Miles for S.O.S. ($55m.) was approximately the same as the price paid by Sterling for Lehn & Fink; both acquisitions represented the first significant diversification by the respective drug companies into the household consumer products field; and that S.O.S. had a significantly larger share of its market than Lysol had of its market.

While this petition was pending, the Miles-S.O.S. acquisition was consummated, as reported to the Commission on September 27, 1968. Thereafter, on October 25, 1968, General Foods (for itself and Miles Laboratories) submitted a formal request for confidential treatment of various documents which had been submitted in July in support of the application for approval of the Miles-S.O.S. acquisition.

[2/] For example, comparing Miles in 1967 with Sterling in 1965 (the dates of the respective mergers) (m. represents million):

	Miles	Sterling
U.S. assets	$113m.	$132m.
U.S. sales of proprietary medicines and household consumer products	$ 90m.	$ 91m.
Advertising expenditures	$ 32m.	$ 31m.
Market share of principal products	15.4% (Alka-Seltzer)	15.8% (Bayer)

(continued)

Between September and November, 1968, the Commission also received various memoranda with regard to Sterling's petition to close the case against it. These memoranda, from FTC staff and a Commissioner, analyzed and compared the Sterling-Lehn & Fink acquisition with the Miles-S.O.S. acquisition (App., pp. 56, 57, ¶9(e)-(i)). On November 29, 1968, the Commission notified General Foods that its October 27 request for confidential treatment of material in support of the Miles-S.O.S. acquisition was approved (App., pg. 12). Three days later, on December 2, 1968, the Commission notified Sterling that its petition to close the file and its request for hearing was denied. No reasons were given for this action.[3/]

C. The FTC Formal Complaint Against Sterling

Notwithstanding the Commission's denial of Sterling's petition to close, it did not proceed to issue the proposed complaint.

2/ (continued from preceding page)

Comparing S.O.S. (1967) vs. Lysol (1965):

	S.O.S.	Lysol
Factory sales	$ 20m.	$ 18m.
Advertising expenditures	3.4m.	3m.
Retail market share (est'd)	45%	23%

3/ Sterling was advised by telephone of the FTC's denial of its petition to close; no order or other written record was sent to it or otherwise made public. The in camera documents submitted to the court below contain a minute order reflecting the Commission's decision upon Sterling's petition to close, entered after the various memoranda. (See, App., pg. 76, ¶12).

Instead, the Commission's staff undertook to consider markets other than the household liquid and aerosol deodorizer and disinfectant markets to which the proposed complaint had been directed. In several memoranda in April and May, 1969, the FTC staff advised the Commission of the course which was being pursued, and analyzed the proposed revised theories and new definitions of relevant markets in terms of the impact of the Miles-S.O.S. determination (App., pp. 57-58, ¶9(j)-(k)). The Commission evidently approved the staff recommendations, since a revised complaint was then prepared.[4/]

On August 7, 1969, the Commission issued a formal complaint against Sterling in a proceeding designated FTC Docket No. 8797. This formal complaint alleged that the acquisition of Lehn & Fink violated Section 7 of the Clayton Act on grounds differing radically from the prior proposed complaint. The complaint alleges three theories of violation not asserted in the proposed complaint, i.e., alleged anticompetitive effects in (a) the manufacture and sale of "health and beauty aids", (b) the manufacture and sale of "proprietary drugs" and "personal care products", and (c) the manufacture and sale of "acne aids and external antiseptics." A fourth theory of violation deals with the effects upon the Lysol field, the sole ground of the prior proposed complaint, although this claim is now limited to a "household aerosol deodorizer market", and alleges that "Lehn & Fink's position

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4/ The in camera documents submitted to the court below appear to contain Commission minute orders in response to the staff memoranda of April 16, 1969 and May 29, 1969. (App., pp. 76-77, ¶¶13 and 14).

as the dominant firm in the household deodorizer market has been, or may be further entrenched...."

D. Proceedings After Issuance of the FTC Complaint Against Sterling

Because of the above events, or rather, because of those above events which were known to Sterling at the time, Sterling asserted two affirmative defenses in its answer to the FTC complaint. It urged, first, that the Commission's approval of the Miles-S.O.S. acquisition demonstrated that Sterling's acquisition of Lehn & Fink did not violate the Clayton Act. Second, it alleged that the issuance of the complaint was arbitrary and capricious and a denial of due process of law because the drastic revisions and change in theory from the proposed complaint constituted a deliberate attempt to avoid the consequences of the Miles-S.O.S. determination, and to accord diametrically opposing treatment to substantially identical transactions.

In order to obtain information pertinent to these defenses, Sterling moved on December 2, 1969, for issuance of a subpoena requiring production and disclosure of FTC documents which constitute or describe the basis for the FTC's approval of the Miles-S.O.S. acquisition, and other documents pertinent to the relation of the two cases. Plaintiff's request was based upon the FTC Rules of Practice, and upon the Freedom of Information Act, 5 U.S.C. §552. FTC staff counsel contested both grounds. The Hearing Examiner, acting sua sponte struck Sterling's

affirmative defenses on the ground that he had no authority to consider them; and denied plaintiff's motion for production of documents, on the ground that the related affirmative defenses had been stricken (App., pp. 33-34). The Examiner did not discuss or rule upon Sterling's application under the Freedom of Information Act, although his opinion noted that a claim under that Act had been presented (App., pg. 33).

Sterling then applied to the Commission for leave to appeal, arguing that the defenses should not have been stricken, and that it was entitled to the documents requested, first, under those defenses and, independently, under the Freedom of Information Act. The Commission denied leave to appeal, Commissioner MacIntyre not concurring (App., pg. 35). In stating the grounds for denial, the Commission declared that the striking of the affirmative defenses "has not eliminated the substance of those alleged defenses from the hearing." It made clear, in short, that the Miles-S.O.S. decision of the Commission was properly an issue in the case:

> Nothing in the examiner's ruling has foreclosed respondent from arguing any points he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of S.O.S. [App., pg. 37].

Like the Hearing Examiner, the Commission majority did not rule upon or discuss Sterling's claim under the Freedom of Information Act.

Relying upon this Commission opinion, Sterling presented to the Examiner, in a proposed statement of contested issues of law and fact, a number of issues dealing with similarities between the Miles-S.O.S. acquisition and the Sterling-Lehn & Fink acquisition. It also requested admissions relating to Miles-S.O.S. On March 19, 1970, the Hearing Examiner entered an order defining the contested issues of law and fact, which excluded all proposed issues relating to Miles-S.O.S. The Examiner, in denying plaintiff's request for admissions related to this matter, precluded any renewal of plaintiff's motion to subpoena documents which formed the basis for the FTC's approval of Miles' acquisition of S.O.S. While acknowledging that the Commission's previous action permitted Sterling to "use the Miles-S.O.S. decision of the Commission as a precedent", the Examiner ruled that Sterling could only use it in arguments and briefs and that, consequently, no contested issues or discovery could be framed (App., pg. 38).

Plaintiff sought leave to appeal this order of the Hearing Examiner. On April 16, 1970, the Commission denied plaintiff leave to appeal, Commissioners Dixon and MacIntyre not concurring (App., pg. 39). As the basis for its denial, the Commission stated:

> The issue in this proceeding is whether respondent has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the Miles-S.O.S. acquisition. The respondent, therefore, is not entitled to discovery pertaining to the Commission's records or actions in that matter. [App., pg. 39].

E. The Hearing in the Federal Trade Commission

On December 7, 1970, the hearing before the FTC Hearing Examiner on Docket No. 8797 began. The government completed its presentation of its case on December 18, and Sterling began presenting its case on January 11, 1971. At this time, it appears that the hearing will be concluded by January 22, after which the government will have 25 days in which to prepare its post-trial brief, proposed findings of fact and conclusions of law. Sterling will have 20 days after the submission of the government's material to present its own brief and proposed findings and conclusions.

3. Proceedings in the District Court

On July 7, 1970, Sterling filed a complaint in the district court seeking access to (a) all documents relied upon by the Federal Trade Commission in approving the Miles-S.O.S. acquisition, including the submission of General Foods and the documents which contain the grounds or reasons for the FTC approval of Miles-S.O.S.; (b) all FTC documents comparing the Miles-S.O.S. acquisition to or distinguishing it from the Sterling-Lehn & Fink acquisition; and (c) all FTC documents comparing the acquisitions in relation to the modification of the grounds alleged in the proposed complaint to those in the formal complaint. Sterling urged that production of the documents requested was necessary to provide it with its right to a fair hearing; it also sought the documents under the Freedom of Information Act.

The Commission filed a motion to dismiss, or, in the alternative, for summary judgment on October 12, 1970. The motion was based on the Commission's contentions that the requirement of exhaustion of administrative remedies deprived the district court of jurisdiction to order production of the documents and that the exemptions to the Freedom of Information Act applied to the documents requested by Sterling. Sterling responded with a motion for partial summary judgment on October 28, 1970. A hearing on these motions was held on November 25, 1970.

On December 4, 1970, the district court filed an order granting the Commission's motion for summary judgment. In an accompanying opinion, the court upheld the contentions of the Commission that the district court lacked jurisdiction to intervene in the administrative proceeding and that the documents were exempted from the coverage in the Freedom of Information Act (App., pp. 66, 71, 73, 77).

ARGUMENT

I. THE FREEDOM OF INFORMATION ACT REQUIRES THAT THE FEDERAL TRADE COMMISSION DISCLOSE THE DOCUMENTS RELIED UPON, FORMING A BASIS FOR, AND EXPLAINING THE MILES-S.O.S. DECISION

The Freedom of Information Act, 5 U.S.C. §552, requires all federal agencies to make available identifiable records on request of "any person" (5 U.S.C. §552(a)(3)). As pointed out in the Statement of Facts, Sterling made several requests under this provision. The Commission has never urged that these requests were not properly presented, yet it never deigned to pass upon them.[5/] It was only after this action was brought that the Commission has urged any reasons for denying the access Sterling has sought.

The documents in question were reviewed by the court below, but the conclusions based on that review do not show that the requirements of the Act have been met. Specifically, we submit that the district court failed to apply the mandate of this Court to ensure "that the exemption is strictly construed in the light of the legislative intent" (Bristol-Myers Co. v. FTC,

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5/ This failure was itself a violation of the Administrative Procedure Act, 5 U.S.C. §555(e) which requires that:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in firming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

____ App. D.C. ____, 424 F.2d 935, 938 (1970), cert. denied, 31 L.W. 3147). Moreover, there was a clear failure to deal with the actual requirements of the Act and with the teaching of American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F.2d 696 (1969), that agency memoranda will be disclosed when needed to provide information about the basis and rationale of an unexplained agency decision.

A. The Freedom of Information Act Requires That A Liberal Standard of Disclosure Be Applied By Federal Agencies.

The Freedom of Information Act represents a directive by the Congress that, wherever possible, information available to the executive agency of government shall be made available to the public. The Act provides that where any person requests identifiable records, they shall be made available to him unless they are specifically exempted (5 U.S.C. §552(a)(3) and (b)).

The structure of the Act makes clear its purpose to liberalize access. First, the person requesting access need not show that the documents are of particular interest to him or that he has any special need to see them. It is for the agency, if it desires to refuse access, to urge one of the specific exemptions enumerated in the Act. Second, if the agency refuses to disclose the documents, the Act provides remedies in the courts to assure that the denial was proper. A complaint may be brought in the district court of the district in which the complainant resides or has his principal place of business,

thus making jurisdiction over these cases nationwide. Such a cause is to be given expeditious handling by the courts, taking precedence over all other causes except those cases considered by the court to be of greater importance. Finally, the courts need not accord deference to any agency "expertise", but must determine the matter de novo, with the burden placed upon the agency to sustain its action (5 U.S.C. §552(a)(3)).

The courts have amplified the clear intention of the Congress in the Freedom of Information Act. As this Court has stated, the Act creates "a liberal disclosure requirement", and specific exemptions are to be "narrowly construed" (Bristol-Myers, supra, ____ App. D.C. at ___, 424 F.2d at 938).

The Commission's behavior in this case is wholly inconsistent with the purpose of the Congress "to increase the citizens' access to government records" (Ibid.). There was no inclination even to pass on Sterling's request, much less to "keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions" (Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June, 1967, pp. 2-3). The liberal attitude suggested by the Attorney General might have been particularly appropriate in this case, since the Commission's own rules now require that its decisions to approve these kinds of acquisitions be accompanied by a "statement of supporting reasons" (16 C.F.R. 3.61(e), Add. 3a).

B. The Commission Memoranda Do Not Qualify For Exemption Under the Freedom of Information Act.

1. The Commission Documents

The Commission documents submitted for the in camera review of the court below fall into three categories:

1. Two staff memoranda (July 9 and 11, 1968) submitted prior to the Commission's decision approving the Miles-S.O.S. acquisition. These memoranda analyze the merger and recommend Commission action. (App., pp. 55 and 73).

2. A memorandum of the Commission (July 11, 1968) reflecting its deliberations, advising that the memoranda in (1) had been received, and advising of its approval of the acquisition. (App., pp. 56 and 74).

3. Memoranda written by FTC staff and individual Commissioners subsequent to the Commission's Miles-S.O.S. decision (July 15, September 24, October 1, October 4, October 22, November 13, 1968 and April 16 and May 29, 1969) which contain discussion and recommendations based upon the decision approving the Miles-S.O.S. acquisition. (App., pp. 56-58 and 74-77).

In summary, the Commission documents consist of analyses of the Miles-S.O.S. acquisition upon which the Commission undoubtedly relied, a report of the Commission's deliberations and decision in Miles-S.O.S., and subsequent interpretive materials prepared by Commission members and staff.

2. The Decision Below

The court below conducted an in camera review of the Commission documents sought by Sterling. After describing each one briefly, the court concluded simply:

> Examination of the above listed items leads to the conclusions that they are not "purely factual reports and scientific studies" (Bristol Myers Company v. Federal Trade Commission, ___, U.S. App. D.C. ___, 424 F.2d 935, 939 (1970) but are in fact "'those internal working papers in which opinions are expressed and policies formulated and recommended.'" (Bristol Myers, supra citing Ackerly v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969)). [App., pg. 77].

We submit that this analysis meets neither the standards laid down by this Court in Bristol-Myers nor the requirements of the Act itself. Further, the court has not followed the teaching of American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F.2d 696 (1969) that internal memoranda are subject to disclosure when necessary to explain an agency decision.

In Bristol-Myers, this Court established the procedure to be followed in action under the Freedom of Information Act. The documents sought to be protected by the agency are to be submitted for in camera inspection by the court. Exemptions were to be "narrowly construed" (Bristol-Myers, supra, ___ App. D.C. at ___, 424 F.2d at 938). The court is to determine whether any exemptions apply and should state the reasons therefor. Finally, the court must consider whether the agency interest can be protected by deletions or by other means so as to permit disclosure (Grumman Aircraft Engineering Corp. v. Renegotiation Board, ___ App. D.C. ___, 425 F.2d 578, 582 (1970)).

The opinion below does not reveal that the kind of examination called for by the opinions of this Court has been made. For example, documents subsequent to the Miles-S.O.S. decision appear to contain statements setting forth the rationale of that Commission decision. The opinion nowhere indicates that the possibility was considered of disclosing of such parts of the documents. Certainly, the mere presence of a recommendation does not immunize an entire document containing other material.

Moreover, the court failed to treat two further questions that must be faced once it is determined that the documents sought are, in fact, "intra-agency" memoranda:

First, the exemption for such memoranda in the Freedom of Information Act is not absolute. It is available only to those memoranda "which would not be available by law to a party other than an agency in litigation with the agency" (5 U.S.C. §552(b)(5)).[6/]

Perhaps the most comprehensive discussion of the availability of internal government memoranda in private litigation is found in Carl Zeiss Stiftung v. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C., 1966). Zeiss was a private suit in which a subpoena was issued commanding the production of documents in Department of Justice files. The Department sought to protect certain memoranda from discovery. After considering the basis for establishing a

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6/ This clause was not mentioned in the opinion below. The court described the exemption as applying to "intra-agency memorandums not available to a party" (App., pg. 71).

privilege for internal government memoranda, the court turned to an examination of the competing interests:

> To restate the Government's claim and its justification is not to say that non-disclosure is to follow in all instances where the conditions prerequisite to invoking the privilege are found to exist. Nor is it to suggest that interests it protects cannot be outweighed in particular situations by a sufficiently strong showing of necessity for examination. [40 F.R.D. at 327.]

In striking this balance in Zeiss, the court found that the government documents should be protected since (1) a great number of documents had already been provided; (2) there was no showing that the documents withheld had any special information that could not have been obtained elsewhere; and (3) there was no adequate showing that the documents contained any useful information. Moreover, the court pointed out that because the government was not a party, no problem of an unfair litigating advantage was presented.

The facts in this case are wholly different from Zeiss. Here, the Commission seeks to withhold memoranda that could cast light on the underlying basis of its own decision, the rationale of which has so far been withheld from public view. There are no alternative sources of information open to the public. Most important, failure to disclose these documents places Sterling at a severe disadvantage in prosecuting its own case before the Commission. Under these circumstances, it cannot be said that the documents sought "would not be

available by law to a party other than the agency in litigation with the agency."

Second, even if the documents in question meet the standards for protection of the Zeiss case, it was incumbent on the court below to proceed to determine whether or not the holding of American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F.2d 696 (1969) is applicable. In Gulick, this Court examined the action of the Maritime Subsidy Board in ordering a refund of subsidy payments. The Board's determination stated that it had "considered memorandum dated November 26, 1965, revised December 20, 1967, recommending that the Board approve" certain manning scales. "After discussion . . . the . . . Board found and determined" that the recommended manning scales should be adopted (Gulick, 133 App. D.C. at 386, 411 F.2d at 700). The court concluded that the Board had issued its ruling based substantially upon the staff memorandum. After examining the legislative background of the exemption for intra-agency memoranda, the court commented:

> We do not feel that [the agency] should be required to "operate in a fishbowl," but by the same token we do not feel that appellants should be required to operate in a darkroom. [Ibid., 133 App. D.C. at 389, 411 F.2d at 703]

Because of the reliance placed by the agency upon the staff memorandum, it "lost its intra-agency status and became a public record, one which must be disclosed to appellants" (Ibid.).

The court, in Gulick, was critical of the Board's administrative practice. But its confidence that the practice was

"unique" (133 App. D.C. at 387, 411 F.2d at 701) seems to have been misplaced; the situation here is strikingly similar. Here, the Commission staff submitted memoranda regarding the Miles acquisition of S.O.S. The Commission deliberated on the acquisition after receiving these memoranda. Its decision approving the acquisition must have been based upon the memoranda. No reasons for the decision were ever made public.

In sum, we have here the same evils the court faced in Gulick. The Commission has made a decision without disclosing its reasons therefor, a practice its own regulations would now condemn. It has contended that no document embodies its reasons, but it is clear that staff memoranda were relied upon. Moreover, the Commission recorded its deliberations in a memo to the staff,and other memoranda can elucidate the rationale of that Commission decision. We submit that the holding of Gulick ought to apply here to force the Commission to inform the public it has been empowered to regulate.

The application of Gulick to this case would not be disruptive of the administrative process nor a substantial extension of the holding there. As we have seen, the Commission now requires of itself that these decisions be accompanied by reasons. This self-imposed regulation should set to rest any concern that the application of Gulick to this case would have far-reaching or undesirable results.

Moreover, we have here, not some ministerial decision of the Customs Bureau, but the approval of an acquisition after

a successful divestiture proceeding. The Commission had just forced General Foods to sell S.O.S.; it must have considered whether the acquisition by Miles would result in the same anti-competitive consequences. Not only was this a sophisticated analysis under a complicated statute, it was one in which the Commission knew it would be setting standards by which companies in similar circumstances would thereafter have to be guided. We believe that the Commission was obliged to make findings to support that decision.[7/] But the absence of agency findings does not justify secrecy. On the contrary, the teaching of Gulick is that in the absence of its own statement of reasons, the agency will be required to disclose staff memoranda in order to provide access to the basis for the agency decision and its rationale.

C. The Documents Submitted by General Foods Do Not Qualify For Exemption Under the Freedom of Information Act.

The Commission has asserted that it cannot provide the documents submitted by General Foods, upon which it "entirely relied" in approving the Miles-S.O.S. acquisition, because they are confidential information obtained from a person and containing trade secrets and commercial or financial information. The Commission characterized this material as including "highly sensitive financial data" and "vital competitive statistics" such as sales, profit and market share data (Memorandum in Support of

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7/ See discussion at pp. 28-30.

Defendants' Motion to Dismiss Or, In the Alternative, for Summary Judgment, p. 15). Since the Commission did not make any finding of confidentiality under the Freedom of Information Act in response to Sterling's application, its arguments to the district court must have been based upon the November, 1968 determination. The record does not support the need for confidentiality in 1968; it is inadequate to sustain the agency's burden under the Freedom of Information Act at the present time.

Examination of the October, 1968 General Foods letter requesting confidentiality (App., pp. 9-11) does not show any substantial ground for confidentiality under the fourth exemption to the Freedom of Information Act (5 U.S.C. §552(b)(4)). The alleged sensitive material consisted of data on market shares of Miles products; on sales between Miles and General Foods; and on sales, costs and profits of S.O.S. products. This precisely is the kind of data which typically is disclosed in antitrust merger cases. Similar statistics on Sterling and Lehn & Fink are set forth in the Commission's exhibits in the pending case. And General Foods' argument for confidentiality in 1968 did not assert unusual trade secret needs. On the contrary, it stressed that the Miles data were "not really relevant to the S.O.S. divestiture"; and that public disclosure of the reports on S.O.S. "would be unncesssary for protection of the public interest" and "would be prejudicial to the orderly transfer of the S.O.S. business to Miles . . ." (Ibid.). These reasons are not relevant to requests under the Freedom of

Information Act. Moreover, the reasons clearly no longer obtain so long after the transfer has been made, and so long after the trade information was current. The Commission's ex parte approval of the General Foods' request for confidentiality is almost two years old; the information is even older. The mere submission of these documents to the district court, coupled with a contention that they are confidential, cannot be said to meet the burden the Act places upon the Commission.

Finally, public disclosure of the material submitted by General Foods is required under the Act, because this material was explicitly relied upon by the Commission in approving the Miles-S.O.S. acquisition. These documents have, in effect, been incorporated by reference into the Commission's approval of the Miles-S.O.S. acquisition as an important element thereof. Because of this fact, the previously-discussed authority of American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F.2d 696 (1969) calls for disclosure. To paraphrase Gulick, if the Commission did not want to expose material submitted by third parties to public scrutiny, it should not have stated publicly in its July 12, 1968 letter that it entirely relied upon the information submitted by General Foods giving no other reasons or basis for its action.[8/]

8/ The court in Gulick stated:

"If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action." (133 App. D.C. at 389, 411 F.2d at 703).

II. DISCLOSURE OF THE REQUESTED DOCUMENTS CONCERNING THE MILES-S.O.S. DECISION IS REQUIRED TO PROVIDE A FAIR HEARING BEFORE THE COMMISSION

The Miles-S.O.S. decision, raising the same Clayton Act issues as the Sterling case, is clearly relevant in the proceeding now before the Commission. Yet the Commission has thwarted the exercise of Sterling's right to present contentions as to the scope and impact of that decision. First, the Commission has denied any access to the reasons and grounds for that decision; most recently, it has asserted that the earlier case has no relevance at all to the pending proceeding. We submit that the denial of information here amounts to a denial of a fair hearing and that there is no adequate remedy on appeal from a final order. The law is clear that a district court has jurisdiction to grant relief at an interlocutory stage of an FTC proceeding under these extraordinary circumstances. We submit that it should have done so in this case.

A. The Miles-S.O.S. Decision and the Basis Therefor Are Patently Relevant to the Sterling Case.

The data enumerated in the Statement of the Case (Pp. 6-7) demonstrates that the Miles-S.O.S. and Sterling-Lehn & Fink acquisitions raise the same or very similar issues under the Clayton Act. This similarity ought to satisfy any question whether the decision in the former case is relevant to the latter. Even the Commission has demonstrated its own keen awareness of the importance of the Miles-S.O.S. decision. For example, the agency memoranda, as described in the opinion below

(App., pp. 74-76) are replete with comparisons of the two cases. The proposed complaint, which was wholly based upon the acquisition of the Lysol market was largely abandoned, undoubtedly, as a result of the Miles-S.O.S. decision. The district court acknowledged that "there should be no difference" in treating similarly situated parties and that the denial of access to the grounds of the Miles-S.O.S. decision may constitute "a denial of plaintiff's right to a full and fair hearing".[9/]

Despite these acknowledgments of the importance of Miles-S.O.S. in the Sterling case, the Commission has denied Sterling's right to raise the case as a precedent.[10/]

We submit that the posture of the Commission on the issue of relevance is indefensible. It represents only another

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9/ Transcript, pg. 12; App., pg. 71.

10/ The Commission's behavior on this issue has been somewhat confused. Initially, the Commission stated that "Nothing in the examiner's ruling [denying Sterling's request for production of documents] has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of S.O.S." (App., pg. 37). The Hearing Examiner construed this statement to mean that Sterling "may in the course of its arguments and briefs, . . . use the Miles-S.O.S. decision of the Commission as a precedent" (App., pg. 38). The Commission then stated that the issue was "not the degree, if any, to which the facts here resemble the facts in the Miles-S.O.S. acquisition" (App., pg. 39). This statement was later interpreted in the Commission's Opposition to Sterling's Motion for Partial Summary Judgment as a "ruling that approval of the Miles-S.O.S. merger is not relevant in the administrative proceeding against Sterling" (App., pg. 60).

effort to avoid the consequence of the Miles-S.O.S. decision upon the Sterling case. The similarity of the case on the facts and the Commission's own recognition of this similarity demonstrates that its rejection of the relevancy of the earlier case is erroneous.[11/]

B. The Commission's Denial of Access to the Requested Documents Constitutes a Denial of a Fair Hearing For There is No Adequate Remedy on Appeal From a Final Order.

The opinion below characterized the Commission's action as "nothing more than an adverse ruling on a request for discovery -- a purely interlocutory procedural matter" (App., pg. 70). But this is not a case of "discovery". Here, Sterling seeks to know the reasons behind the agency's adjudication in a case directly in point with its own.

There are few notions that could be more basic to our system of justice than that final decisions affecting the rights of parties be accompanied by reasons therefor.[12/] This

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11/ The Commission cannot be heard to say that the different posture of the Miles-S.O.S. case, coming as a result of a divestiture proceeding, somehow raises different issues under the Clayton Act from those in the Sterling case. It is well settled that a decision approving an acquisition in a divestiture contest amounts to a holding that the acquisition clearly does not violate Section 7 of the Clayton Act. See United States v. Kennecott Copper Corp., 249 F.Supp. 154, 163 (S.D.N.Y. 1965). Indeed, it has been held that a divestiture would be rejected if it had any significant anticompetitive effects, even not amounting to a violation of Section 7. United States v. Aluminum Company of America (Alcoa-Rome), et al., 1967 CCH Trade Cases ¶71,973 (N.D.N.Y. 1966).

12/ The rule is, of course, a necessary corollary to any system that utilizes judicial and administrative decisions to guide future conduct of the public. The Freedom of Information Act requires disclosure of "all final opinions...made in the
(continued on next page)

is especially true where an agency seeks to shift its ground or to distinguish closely similar situations. (FTC v. Crowther, ___ App. D.C. ___, 430 F.2d 510, (1970); City of Chicago, v. FPC, 128 App. D.C. 107, 385 F.2d 629 (1965)). As this Court stated in Crowther, a change "from case to case" requires --

> adequate explication of the reasons why such alteration or adaptation may be seen to be rational and to escape the domain of the seemingly arbitrary. Judicial review of agency action otherwise becomes meaningless and incapable of fulfilling the Congressional purposes in proceeding it. [Crowther, supra, ___ App. D.C. ___, 430 F.2d at 514]

In Crowther, the Commission did provide reasons for its change in position from a prior case, reasons held inadequate by this Court. Here, we are confronted with a situation where the agency refuses to disclose the ground of its prior ruling (in Miles-S.O.S.); and in the court below, it asserted that its prior decision is not even relevant to Sterling's case. The Commission's position here is tantamount to saying that where it has two substantially identical mergers before it, it can hold one legal and the other illegal without explanation and without any

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12/ (continued from preceding page)

adjudication of cases." 5 U.S.C. §552(a)(2)(A). That such final opinions would not be issued seems not to have been anticipated. See Gulick, supra, 411 F.2d at 702. Indeed, the Commission's own rules now require that such reasons be given.

right of a party even to raise the point. This is directly contrary to Crowther and other cases.

In condemning the Commission's failure to provide reasons in Crowther, the court focused on the problems such omissions raised for judicial review. But litigants also face overwhelming difficulties in these cases. How is Sterling effectively to prepare its case without access to the grounds supporting the leading precedent? The Commission responds by insisting that the issue in the pending case is solely the validity of Sterling's merger, as if to say that inquiry regarding Miles-S.O.S. is an unwarranted digression. This contention is obviously erroneous: To take one of innumerable examples, the Commission's decision in General Foods-S.O.S. contains a close analysis of the theory of the earlier Procter & Gamble-Clorox decision and a lengthy appendix tabulating and comparing the facts in the two cases.[13/] There is simply no way to apply prior precedents in the merger field without looking at the rationale and the facts. We submit that given the obvious and documented parallels, Sterling has a right to information above the Miles-S.O.S. decision.

But the prejudice to Sterling goes farther and permeates the entire proceeding. How can it know which witnesses to bring forward, which evidence to adduce, or what points to be urged without knowing why the Commission decided as it did in the Miles-S.O.S. case? Whole areas of evidence may be missing,

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13/ General Foods Corp., Trade Reg. Rep. ¶17,645 (FTC, 1966) [1965-1967 Transfer Binder].

not because of any neglect by Sterling, but because of its inability to obtain access to the most direct and compelling Commission precedent.

In the extraordinary situation Sterling finds itself, it has no adequate remedy on appeal from a final order in the FTC proceeding. This is not a typical case where proferred evidence is excluded and is thus unavailable to the Commission in making its decision. Here, the information sought by Sterling is known to the Commission and will, no doubt, be considered by it. In fact, it must already have been considered when the Commission made a determination that the revised complaint somehow avoids the impact of the Miles-S.O.S. decision.

Moreover, unlike the normal case, Sterling cannot protect the record on appeal by making an appropriate offer of proof. Since there is no information available as to the Miles-S.O.S. rationale, Sterling can only engage in speculation in arguing to the Commission and on appeal. The first time Sterling may see the Commission's efforts to explain, distinguish or ignore its earlier reasoning may be in the government's brief in the Court of Appeals; by then, Sterling's position will be hopelessly prejudiced.

The posture of the case on appeal from a final order would make it impossible for the Court of Appeals accurately to appraise the relevance of the undisclosed Miles-S.O.S. information or the prejudice to Sterling resulting from its exclusion. The court would know only that the earlier decision had

been made; why it was made would be unknown. Under such circumstances, Sterling would have little hope of successfully challenging a justification the Commission might present for treating the cases differently.

There is yet another reason why appellate review of a final FTC order is inadequate: Sterling is faced with a real risk that the standard of review applied by the Court of Appeals at such time would be applied to preclude any remedy on this point. The courts have held that the FTC has discretion to undertake enforcement actions against one party, without uniformly acting against all similarly situated, absent "a patent abuse of discretion," e.g., FTC v. Universal-Rundle Corp., 387 U.S. 244, 250 (1967). We believe that the agency's affirmative decision in approving Miles-S.O.S. is far different from the failure to attack a pending transaction (see fn. 11 supra). But the issue has never been decided. Moreover, by the Commission's action here, plaintiff is being denied access to evidence which might demonstrate the patent abuse required by Universal-Rundle.

In Point II-C below, we cite cases holding that the broad standard for review of final agency decisions may be such an inadequate remedy for certain errors, as to justify interlocutory correction. Here, where we are faced with a substantial doubt as to the effectiveness of appellate review from a final order, the requirement of fair hearing is so important that this Court should grant relief.

C. In These Circumstances, A District Court Has Jurisdiction to Grant the Relief Requested by Appellant.

In the opinion below, the court concluded that it lacked jurisdiction to intervene in the proceeding before the FTC. The court did recognize, however, that such jurisdiction can exist in exceptional cases. (App., pp. 70-71).

Indeed, there are established exceptions to the requirement of exhaustion of administrative remedies, and this case comes within them. There is authority for the district court to exercise jurisdiction, and to review agency action at an interlocutory stage, when there is a substantial claim of denial of fair hearing. This jurisdiction becomes almost mandatory where the remedy following final agency action would be inadequate.

In Amos Treat v. SEC, 113 App. D.C. 100, 306 F.2d 260 (1962), this Court considered the irregularities arising in a case where a staff member recommended an investigation and later sat on the Commission in the same case. The court examined the requirements of due process, concluding that, with regard to agency adjudicatory proceedings, it meant "at least 'fair play.'" (113 App. D.C. at 104, 306 F.2d at 264) "[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of fairness." (113 App. D.C. at 107, 317 F.2d at 267) Finding that the SEC had not met the required standard of fairness, the court concluded that the district court ought to have intervened. The fact that the

irregularity could have been corrected upon review of the agency order did not bar judicial action at an earlier stage, since "the asserted infirmity is fundamental." (133 App. D.C. at 105, 306 F.2d at 265). (Cf. Campbell v. United States, 365 U.S. 85, 96 (1961); In re Murchison, 349 U.S. 133, 136 (1955)).

Furthermore, the Administrative Procedure Act has been held to sustain district court jurisdiction to correct arbitrary and capricious agency action. In Robertson v. FTC, 415 F.2d 49 (4th Cir., 1969), the Fourth Circuit ruled that the remedy for arbitrary and capricious behavior by the FTC in a compliance proceeding is not directly in the Court of Appeals but by suit under the Administrative Procedure Act in the district court, which has power to develop a record and to consider the allegation in the light of the record and of the public interest. Cf. Rettinger v. FTC, 392 F.2d 454 (7th Cir., 1968).

A cogent district court discussion of jurisdiction of the courts to enforce due process requirements is found in Union Bag-Camp Paper Corp. v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964). Union Bag sought to compel production of certain evidentiary material for use in a pending case. Citing Amos Treat & Co. v. SEC, supra, for the proposition that "the administrative process must be attended not only with every element of fairness but with the very appearance of complete fairness," the court in Union Bag held that interlocutory review would be

required if there was "a breach of a mandatory duty or ... a denial of fundamental due process." The plaintiff would not be required "to wait until it is ordered to cease and disist from violating Section 7 of the Clayton Act before obtaining redress." If the denial of the information "was so violative of plaintiff's rights as to constitute a fundamental denial of due process, the matter would be ripe for judicial review." 233 F. Supp. at 663. Although the plaintiff there was found not entitled to the reports requested, the reasoning as to the jurisdictional issue is clearly applicable to the instant case.

Where the infirmity in the administrative process is coupled with uncertainty that it can be fully cured upon review of the agency's final order, judicial intervention in the proceeding becomes the only way to assure a fair hearing.

This principle has been expounded most recently by the U.S. Court of Appeals for the Seventh Circuit in Jewel Companies, Inc., et al. v. FTC, 432 F.2d 1155 (7th Cir., 1970). In Jewel, plaintiff sought on four separate grounds to enjoin the FTC from conducting proceedings pursuant to a complaint filed by the Commission charging violations of the Clayton Act. The issue in the case, as stated by the court, was "...whether the plaintiffs must exhaust their administrative remedies before attacking the authority of the Commission." (432 F.2d at 1157) The court explained that the broad language of Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 47 (1933), must be weighed against the decisions in Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919); Leedom v. Kyne, 358 U.S. 184 (1958);

McCullock v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) and Elmo Division of Drive-X Co. v. Dixon, 121 App. D.C. 113, 348 F.2d 342 (1965), all of which permitted review at an interlocutory stage of an administrative proceeding. The court concluded that the doctrine of exhaustion of remedies was discretionary, applicable where review of the final agency order was an adequate remedy. The court went on to sustain district court jurisdiction over the claim that a member of the Commission had misconstrued his statutory obligation in issuing the complaint.[14/]

This Court, like the Seventh Circuit in Jewel, has held that the district court has, in appropriate cases, jurisdiction to correct agency error on an interlocutory basis. By a per curiam opinion, in Elmo Division of Drive-X, supra, the court held that the district court had jurisdiction to enjoin the FTC from continuing a complaint proceeding, ruling that an earlier consent decree required the FTC to proceed by reopening the earlier case. The prime factor influencing that decision, in the court's view, was the "unavailability of other adequate relief" (121 App. D.C. at 118, 348 F.2d at 347).[15/]

14/ The court stated that on that issue, review offered an inadequate remedy, since a Court of Appeals could only decide whether the final order was supported by the evidence. (432 F.2d at 1159) As pointed out in Part II-B, supra, Sterling may find itself in the same position; i.e., the Commission's final order may be within its scope of discretion and expertise notwithstanding the earlier decision in Miles-S.O.S.

15/ Elmo considered the standard employed by Courts of Appeals in reviewing final orders, and concluded that the error could not be vindicated in such review proceeding. Similar consideration (continued)

The United States Supreme Court had occasion recently to examine the doctrine of exhaustion of administrative remedies in McKart v. United States, 395 U.S. 185 (1969). The opinion recognizes numerous exceptions to the principle and states: "Application of the doctrine to specific cases requires an understanding of its purpose and of the particular administrative scheme involved." (395 U.S. at 193) In his analysis, Mr. Justice Marshall enumerated the following four purposes served by the "exhaustion of remedies" precept (395 U.S. 193-94):

> 1. To allow the agency to develop the necessary factual background upon which its decisions are based;
>
> 2. Where agency decisions are of a discretionary nature or require expertise, to give the agency the first chance to exercise that discretion or expertise;
>
> 3. To promote the efficiency of the administrative process by permitting it to go forward without interruption;
>
> 4. To protect executive and administrative autonomy.

The first two purposes listed by Mr. Justice Marshall are certainly not offended by this suit. Development of the factual background is in issue only insofar as disclosure of the reasons for Miles-S.O.S. might lead to a more complete record of evidence for decision. The relief sought by Sterling would not forestall any proper exercise of agency discretion or expertise.

15/ (continued from previous page) of the appellate review standard was noted as ground for interlocutory district court jurisdiction in Skinner & Eddy Corp. v. United States, 249 U.S. at 562 and Union Bag Camp v. FTC, 233 F. Supp. at 663 (S.D.N.Y., 1964).

Nor is the third reason relevant here, since the administrative process has progressed without any interruption traceable to this lawsuit. Insofar as the fourth purpose is concerned, Sterling submits that agency action in this case has been arbitrary and capricious, contradictory and confused. Legal theories have been altered to avoid the consequences of an FTC decision, while the basis for that decision has been improperly hidden. Despite the clear relevance of that decision, the Commission wishes to hear no more of it. Surely this is not a case where administrative autonomy warrants judicial deference. On the contrary, judicial relief is necessary to protect the interests of fairness and due process; and it is respectfully submitted that the courts have jurisdiction to grant it.

CONCLUSION

For the above stated reasons, the order of the district court, granting the motion of the Federal Trade Commission for summary judgment and denying Sterling's motion for partial summary judgment should be reversed.

January 11, 1971

Respectfully submitted,

Herbert A. Bergson
Lionel Kestenbaum
Murray J. Belman

BERGSON, BORKLAND, MARGOLIS
& ADLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006

STATUTORY ADDENDUM

The Freedom of Information Act, 5 U.S.C. §552 provides as follows:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom,and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying --

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of person privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are --

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Section 3.61(e) of the Rules of the Federal Trade Commission, 16 C.F.R. 3.61(e) provides as follows:

> (e) All applications for approval of proposed divestiitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Also, any communications, written or oral, concerning such proposed transactions, received by any member of the Commission, or by any employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth the full contents of such communication and the circumstances thereof, and such memorandum will immediately be placed on the public record. Within thirty (30) days after such applications and materials are placed on the public record, any person may file for the public record written objections or comments with the Secretary of the Commission. All responses to applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with a statement of supporting reasons, will be published when made.

No. 24878

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STERLING DRUG, INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

L. PATRICK GRAY, III,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ROBERT V. ZENER,
BARBARA L. HERWIG,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

I N D E X

CITATIONS

Cases:

* Cases chiefly relied upon are marked by an asterisk.

Miscellaneous (Cont'd):

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24878

STERLING DRUG, INC.,

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

ISSUES PRESENTED *

Sterling Drug, Inc., has been charged by the Federal Trade Commission with a violation of Section 7 of the Clayton Act in connection with its acquisition of Lehn & Fink Products Corporation. A hearing is now in progress before the Commission's examiner. In a previous proceeding, the Commission held that General Foods Corporation's acquisition of S.O.S. Company violated Section 7, and subsequently approved a divestiture plan whereby General Foods sold the S.O.S. business to Miles Laboratories, Inc. In the present administrative proceeding, Sterling claims that its acquisition of Lehn & Fink is similar to Miles'

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* This case has not previously been before this Court.

acquisition of S.O.S. Sterling seeks discovery of various internal staff memoranda discussing the two cases, and certain commercial and financial information submitted by General Foods to the Commission as a basis for obtaining the Commission's approval of the Miles-S.O.S. sale. The examiner denied discovery.

The questions presented are:

1. Whether the district court correctly held, after reviewing the documents in camera, that they are covered by the exemptions in the Information Act for confidential commercial or financial information and intra-agency memoranda, and accordingly are not public documents.

2. Whether the examiner's refusal to permit discovery of the documents in question should be reviewed by the district court at the present time, while the administrative proceedings are in progress, or rather should be reviewed by a court of appeals upon direct review of any final order that the Commission may enter after the administrative proceedings are complete.

STATEMENT OF THE CASE

1. Nature of the Case.

In this action, Sterling Drug, Inc., which is presently involved in a hearing before the Federal Trade Commission on a complaint charging violation of Section 7 of the Clayton Act, seeks review of the examiner's refusal to permit it discovery of certain documents in the Commission's files. Two claims are made: that the documents are public documents subject to disclosure under the Public Information Act, 5 U.S.C. 551, et seq.; and that alternatively the examiner's refusal to permit discovery

constituted a denial of Sterling's right to a fair hearing under the Administrative Procedure Act, justifying an interlocutory appeal to the courts before completion of the administrative proceedings. The district court held that the documents fall within the exemptions in the Public Information Act for confidential commercial and financial information and for internal memoranda containing policy advice and recommendations. The court also held that the examiner's ruling on a question of discovery could be reviewed by a court of appeals on direct review of any final order the Commission might enter on the merits of the acquisition, and that interlocutory appeal to the courts at this stage was not warranted.

2. Statement of Facts.

The Complaint Against Sterling. Sterling Drug, Inc., is a corporation engaged in the manufacture, distribution and sale of drug products, household consumer products and cosmetics throughout the United States (App. 41). In 1966 Sterling acquired Lehn & Fink Products Corporation, which produces "Lysol" brand disinfectant and deodorizer, as well as various health and beauty aids, floor care products, toiletries and cosmetics (App. 4, 6, 42).

In April 1968, the Federal Trade Commission served upon Sterling a proposed complaint, charging that Sterling's acquisition of Lehn & Fink violated Section 7 of the Clayton Act, as amended (15 U.S.C. §18) (App. 2); and Sterling was afforded an opportunity to negotiate a consent order settlement of the controversy. No settlement was reached, and in August 1969, an

adjudicatory proceeding was commenced by service upon Sterling of a complaint charging Sterling with a violation of Section 7 of the Clayton Act (App. 13, 25).

In the proposed complaint it was charged, inter alia, that the merger may have an adverse competitive effect in the sale of:

> (1) household liquid, disinfectants and deodorizers
> (2) household aerosol disinfectants and/or deodorizers in the United States * * *.

(App. 6).

In the formal complaint, the paragraph describing the effects of the merger charged adverse competitive effects in four product lines: (1) health and beauty aids; (2) proprietary drugs and personal care products; (3) acne aids and external antiseptics; and (4) household deodorizers (App. 21).

Sterling, in its answer to the complaint, denied the allegations of anti-competitive effect (App. 30). Sterling also stated that the Commission had approved similar acquisitions and charged that to approve such acquisitions, while proceeding against Sterling's acquisition of Lehn & Fink, was

> arbitrary, capricious and discriminatory and constitute[d] an unlawful and unconstitutional exercise of the Commission's statutory powers.

(App. 26-27).

The Miles-S.O.S. Acquisition. In March 1966, the Commission issued an order requiring General Foods Corporation to divest itself of the business of the S.O.S. Company, which it had previously acquired. S.O.S. Company had manufactured S.O.S. scouring pads. Thereafter, following court review and affirmance of

the Commission's order, General Foods supplied information to the Commission concerning its efforts to locate a buyer for S.O.S., and asked the Commission to approve Miles Laboratories, Inc., as the purchaser. In July 1968, the Commission approved the divestiture plan, stating:

> The Commission has entirely relied upon the information submitted by General Foods and its approval is conditioned upon this information being accurate and complete.

(App. 8).

Thereafter, on October 25, 1968, General Foods requested that certain material it had submitted be classified as confidential. On November 27, 1968, the documents submitted by General Foods were received and filed as a report of compliance and on November 29, 1968, the Commission notified General Foods that certain portions of the report would be accorded confidential treatment (App. 12).

Sterling's Demands for Disclosure. After the Commission approved the Miles-S.O.S. sale, Sterling asked the Commission to close the file in the case against it, on the ground that its acquisition of Lehn & Fink was similar. The Commission denied this request, and issued a formal complaint which, as previously noted, broadened the charges of anti-competitive effect. Sterling then moved in the administrative proceeding for issuance of a subpoena requiring production and disclosure of certain documents in the Commission's files.

Sterling requested, in synopsis:

1. All documents submitted to the Commission by General Foods and others to obtain approval of the Miles-S.O.S. sales;

2. Internal Commission memoranda commenting on Miles' acquisition of S.O.S., or comparing the Miles-S.O.S. and Sterling-Lehn & Fink acquisitions;

3. All documents prepared by the Commission or any of its employees reflecting the Commission's reasons for (a) limiting the original proposed complaint to the allegations contained therein, and (b) changing the allegations in the formal complaint as issued;

4. All documents containing any Commission findings or reasons supporting its approval of Miles' acquisition of S.O.S. (Plaintiff's Exhibit F, specifications to be Attached to Subpoena Duces Tecum.)

The hearing examiner struck Sterling's affirmative defenses based on the Miles-S.O.S. sale, and denied Sterling's request for a subpoena (App. 33-34). Sterling's application to the Commission to file an interlocutory appeal from the examiner's order was denied by the Commission, in a brief opinion which stated:

> The hearing examiner is responsible for framing the issues to be tried and permitting discovery based upon those issues. At present, the examiner is in the process of defining and delineating the issues prior to discovery. By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS.

(App. 37).

Thereafter, Sterling submitted a proposed issue of fact, seeking to determine, "whether the complaint herein was changed by the Commission in a deliberate attempt to avoid the consequences and deprive [Sterling] of the benefit of the Miles-S.O.S. decision." (Defendants' Exhibit I, Order Setting Forth the Contested Issues of Law and Fact, p. 4). Sterling also submitted, "20 factual issues [which] seek to probe the mental processes of the Commission during the period from April 12, 1968, when the Commission served upon [Sterling] a proposed complaint and August 18, 1969, when the present complaint was served upon [Sterling]" (Id.). The examiner ruled that these issues were factual issues which he need not resolve.

Sterling applied to the Commission for permission to file an interlocutory appeal from this ruling. The Commission ruled that the examiner's actions were in accord with the Commission's previous order denying discovery and that:

> * * * The issue in this proceeding is whether [Sterling] has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the Miles-S.O.S. acquisition. [Sterling], therefore, is not entitled to discovery pertaining to the Commission's records or actions in that matter.

(App. 39).

District Court Proceedings. Thereafter, Sterling filed a complaint in the district court seeking to enjoin the Commission from improperly withholding the documents sought. Two claims were stated. The first claim was that the Commission's actions in denying Sterling access to the documents in question "violate

the provisions of the Administrative Procedure Act that parties are entitled to present arguments, and evidence in support thereof, on material and relevant issues, * * * and constitute a denial of [Sterling's] right to a full and fair hearing * * *" (App. 49). The second claim was that the documents in question were required to be produced under the Freedom of Information Act (App. 50-51).

A motion to intervene as defendant was filed by Miles Laboratories. In support of its motion, Miles pointed out that the documents submitted:

> provide details on the various financial components involved in manufacturing and marketing the products. This would be of great value to potential and actual competitors in that it contains warehousing costs, costs of goods, costs of transportation and gross profit. <u>These cost figures are current</u>. Further evidence of the value of this information lies in the fact that Miles plans to modify its distribution network in 1971. Competitors would be able to estimate the decrease in profit resulting from this distribution change and could estimate the attendant decrease in promotional and advertising monies that could be spent without significant threat of competitive response from Miles.

(App. 62) (emphasis added). Miles further pointed out that the documents involved included:

> a document which reviewed the soap pad industry and contained a listing of product suggestions complementary to the SOS acquisition. This material is highly confidential in that certain of the products are presently being developed and premature disclosure would be damaging competitively in introducing such new products.

(App. 63). Finally, Miles stated that the documents included "information on sales by Miles to General Foods, which is also

considered highly confidential and is in the nature of trade secret information" (App. 63).

The district court took no action on the motion to intervene. On the merits, the district court ruled that as to the first claim, Sterling had failed to exhaust administrative remedies. The court stated:

> Plaintiff's first ground for relief seems to be insufficient to warrant district court intervention into the orderly progress of an administrative proceeding. After all, the Commission's action constitutes nothing more than an adverse ruling on a request for discovery -- a purely interlocutory procedural matter. In many cases, old and new, it is established as a well settled principle that review of such matters is exclusive with the court of appeals. This is not to say that the district court can never step in to interrupt proceedings at the administrative level, but such interruptions have always been the exception rather than the rule, and they have always been prompted by patent violations of constitutional or statutory authority.

(App.70-71). The district court went on to state that Sterling's contentions that it had been denied a fair hearing by reason of the denial of discovery "are peculiarly suited to proper advocacy in the appellate court in the event of an adverse final decision at the agency level" (App. 71).

As to the Information Act claim, the district court inspected the documents in camera, described them in detail in its opinion, and found that they are exempted from disclosure under the Act. The court found that the portions of the General Foods compliance report concerning market shares, sales, profit and cost data, and bids for the S.O.S. business, "are covered by the exemption accorded trade secrets and sensitive commercial or financial

information obtained from a person in order to protect his privacy and competitive position" (App. 73). The court further found that the internal memoranda which Sterling sought "are not 'purely factual reports and scientific studies' * * * but are in fact 'those internal working papers in which opinions are expressed and policies formulated and recommended'" (App. 77). Accordingly, the court held, the internal memoranda were within the fifth exemption to the Information Act. 5 U.S.C. 552(b)(5).

This appeal followed the district court's granting of the Commission's motion for summary judgment.

STATUTES INVOLVED

15 U.S.C. 21 provides in relevant part:

* * * * *

> (c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business * * *.

5 U.S.C. 552 provides in relevant part:

* * * * *

> (a)(3) Except with respect to the records made available under paragraph (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action * * *.

* * * * *

(b) This section does not apply to matters that are --

* * * * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * * * *

ARGUMENT

Introduction: The Relationship Between Sterling's Two Claims

At the outset, it is important to define the relationship between Sterling's claim under the Public Information Act, and its claim that denial of discovery denies it a right to a fair hearing under the Administrative Procedure Act.

In its claim under the Public Information Act, Sterling sues as a member of the public, and can prevail only if it convinces the Court that the documents which it seeks are public documents, available to any member of the public who asks for them, regardless of need. One of the clear purposes of the Public Information Act was to eliminate need as a basis for seeing public documents, in order to eliminate the previous practice of Government agencies to deny access to documents on the ground that the requestor had shown no need for them. Senate Report 813, 89th Cong., 1st Sess., p. 5; House Report 1497, 89th Cong., 2d Sess., pp. 1, 8. Accordingly, if Sterling is entitled to the

documents it seeks under the Public Information Act, they -- and similar documents -- become available to any curious member of the public, regardless of need. A consequence of this is that whatever need Sterling may have for these particular documents in connection with its Clayton Act proceeding before the Federal Trade Commission is irrelevant to its Public Information Act claim (although, of course, this asserted need is highly relevant to its claim under the Administrative Procedure Act).

Another consequence of Sterling's status as a member of the public with regard to its Public Information Act claim is that, as to this claim, Sterling is not required to await the outcome of the Clayton Act administrative proceeding before bringing suit. As soon as Sterling exhausted its administrative remedies under the Public Information Act (which it has done[1/]), it was entitled to bring suit in the district court as a member of the public. Any other member of the public could sue at this stage and obtain a judicial ruling on the merits of the claim that the documents sought are public documents; Sterling's involvement in the pending Clayton Act proceeding imposes no disabilities on it in its capacity as a member of the public seeking to inspect what it

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1/ In its brief, Sterling points out that neither the Commission nor the examiner ruled on Sterling's Information Act claims, but rather treated Sterling's request solely as a question of discovery. However, since Sterling made the necessary Information Act request, it has exhausted its administrative remedies under that Act. The fact that the Commission made no ruling under the Act did not prevent the district court from reaching the merits of the Information Act claim. Since Information Act suits call for de novo consideration in the district court rather than review of an administrative ruling, the fact that the administrative agency has made no explicit ruling on the claim and written no opinion does not require a remand to the agency, and does not preclude a ruling on the merits where the plaintiff has exhausted its administrative remedies.

believes to be public documents. However, in this capacity, Sterling has no right to assert any particular need arising out of the pending Clayton Act proceedings; the sole question is whether the documents sought are required to be disclosed by the Public Information Act, or rather fall within the exemptions in the Act for confidential commercial and financial information and/or for internal memoranda of policy advice and recommendation.

In its claim under the Administrative Procedure Act, Sterling asserts, in substance, that even if the documents it seeks are not documents available to any member of the general public under the Public Information Act, they are nevertheless documents that should be made available to it because the particular circumstances of the Clayton Act proceeding make discovery of these documents essential if Sterling is to receive a fair administrative hearing. It is as to this claim that the district court held that Sterling could not presently obtain judicial review, since what it sought essentially was an interlocutory appeal on a question of discovery. It is as to this claim that Sterling's status as a litigant in a pending administrative proceeding is relevant, since completion of that proceeding may render its claim to discovery moot or may cast new light on Sterling's asserted need for the documents, and in any event will provide Sterling with an opportunity for judicial review as part of the review of the Commission's final ruling on the merits of the Clayton Act charge.

I

THE DISTRICT COURT CORRECTLY HELD THAT THE DOCUMENTS ARE COVERED BY THE INFORMATION ACT EXEMPTIONS FOR CONFIDENTIAL, COMMERCIAL AND FINANCIAL INFORMATION AND INTERNAL MEMORANDA.

A. The Internal Memoranda.

The fifth exemption to the Public Information Act, 5 U.S.C. 552(b)(5), provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are not subject to compelled production.

The purpose of this exemption was expressed in the Senate and House Reports:

> * * * It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." * * * 2/
>
> * * * Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." 3/

The district court's description of the internal memoranda involved (App. 73-77) here makes it clear that these are "discussion of legal and policy matters" and "advice from staff assistants

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2/ Senate Report, supra, p. 9 (Emphasis added).
3/ House Report, supra, p. 10 (Emphasis added).

and the exchange of ideas among agency personnel." This Court has held that memoranda such as the ones in question here are exempt from disclosure. In Ackerly v. Ley, 137 App. D.C. 133, 420 F. 2d 1336, it was said, "the Congress intended that Exemption (5) was to reflect the privilege customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended." 420 F. 2d at 1341. Other decisions are in accord. See Benson v. General Services Administration, 415 F. 2d 878 (C.A. 9); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y.), appeal pending. The memoranda described above are clearly those in which "opinions are expressed and policies formulated and recommended," and as such are exempt from disclosure.

Sterling does not seriously contest the district court's characterization of the internal memoranda as setting forth policy advice and recommendations.[4/] Instead, Sterling makes an argument that such memoranda should be considered as public documents subject to the inspection of the general public, despite the precedents set forth above. Relying on dictum in Carl Zeiss Stiftung v. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C.), Sterling argues that in some cases there may be such overwhelming need for a particular litigant to inspect internal memoranda of policy advice and recommendation, that the normal privilege against disclosure of such

4/ There is a suggestion in Sterling's brief that the district court should have considered excerpting. However, the district court's description of the internal memoranda makes it apparent that to excerpt out the policy advice and recommendations would leave essentially meaningless pieces of paper.

memoranda must give way. Since this might happen in rare cases,[5/] Sterling argues, such memoranda are accordingly "available by law to a party other than an agency in litigation with the agency," within the meaning of the exception to Exemption 5. Accordingly, the argument runs, such memoranda are public documents.

This argument, if accepted, would wholly repeal exemption 5. If it is true that all internal memoranda might, in some hypothetical or actual case, be available to a litigant upon a sufficiently compelling showing of need, then under Sterling's argument, there are absolutely no internal memoranda that are left to be covered by Exemption 5. Under Sterling's argument, the "available by law to a litigant" qualification to exemption 5 would swallow the entire exemption, leaving nothing. This Court in Ackerly v. Ley, supra, eloquently described the consequences that would follow public disclosure of internal policy discussions:

> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view -- a process as essential to the functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchial giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

420 F. 2d at 1341. Sterling's argument would serve notice on all agency staff that their internal policy discussions are

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5/ We know of no case in which this has actually happened, and Sterling cites none. The Gulick case, discussed infra, was one in which the staff memorandum was cited and quoted in an agency decision and thus lost its internal quality.

subject to public disclosure, with all the consequences that this Court foresaw as to the candor and quality of staff advice that Government agencies would henceforth receive.

Sterling argues that under the reasoning in American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F. 2d 696, production of the internal memoranda should be compelled. In Gulick, the Maritime Subsidy Board issued an opinion which specifically stated that it was relying on a staff memorandum, and set forth the last five pages of the memorandum as findings of the Board. In that situation, this Court held that the memorandum was subject to production under the Freedom of Information Act. The Court stated: "If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action." 411 F. 2d at 703.

The Commission's action in approving the General Foods report of compliance is wholly different from the action of the Board in Gulick. In Gulick, the Board appended the findings from a staff memorandum to the Board's opinion and adopted those findings as its own. Nothing of this sort happened here, where the Commission stated no reasons for its action in approving the Miles-S.O.S. sale. At several points in its brief, Sterling states that the Commission "undoubtedly relied" on its staff memoranda. There is simply no basis for this statement. All that happened is that the Commission issued a decision without reasons, after receiving certain staff memoranda. Sterling can no more say that the Commission relied on and adopted its staff memoranda, than it

could say that a judge must have relied on and adopted his law clerk's memorandum when the judge issues a decision or order without stating reasons.

The fact of the matter is that the Commission did not give a statement of reasons when it approved the Miles-S.O.S. sale, either by way of adopting its staff memoranda, or otherwise. Whether it should have stated its reasons is an entirely different issue (which we discuss, infra at pp. 28-30). The fact is that it did not, and Sterling can no more reconstruct an opinion of the Commission from its staff memoranda, than a litigant in court can reconstruct an opinion of the court, where the court fails to write one of its own, by rummaging among the memoranda of the court's law clerks.

B. The Documents Submitted by General Foods.

Four of the documents submitted to the court for in camera inspection were documents submitted to the Commission as part of the General Foods compliance report, and had been accorded confidential treatment by the Commission, upon request of General Foods. These four documents were described by the court as follows (App. 72):

1. Numbered paragraphs 3(b) and 4 of Exhibit VII of a document dated July 5, 1968 entitled "Memorandums on Divestiture of S.O.S. Business by General Foods Corporation." Paragraph 3(b) indicates the market shares of certain Miles Laboratory products, i.e. ALKA-SELTZER, ONE-A-DAY, and CHOCKS. Paragraph 4 reflects the dollar amounts of sales and certain products between Miles Laboratories and General Foods.

2. Report dated May 27, 1968, entitled "The S.O.S. Business." This item contains a breakdown of sales and profit data for each S.O.S. product over the ten year period, 1959-1968.

3. Report dated June 3, 1968, entitled "The S.O.S. Business - Index to Exhibits," contains breakdown of sales, cost and profit data by product and customer classification.

4. S.O.S. Offers at July 8, 1968. This item lists the bids submitted to General Foods on a closed basis. The amounts of the various bids -- not the names of the bidders -- were labelled confidential.

The fourth exemption to the Information Act, 5 U.S.C. 552(b)(4), provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" shall be exempt from disclosure under the Act. If, as Sterling argues, the documents involved here do not constitute "confidential commercial or financial information," it is indeed difficult to understand what information would ever be held to fall within that category.

The legislative history shows that this exemption was designed to cover the documents in question here. The Senate Report states:

> This exemption is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. * * * 6/

In the present case, the information submitted by General Foods and Miles is information which would not customarily be made available to the public. Both Miles and General Foods have sought to prevent public disclosure of the information; General Foods by requesting confidential treatment for it, and Miles, by

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6/ Senate Report, supra, p. 9 (emphasis added).

filing a "Motion to Intervene" in the district court, and an amicus brief in this appeal, seeking to assert the continued need for confidential treatment of the information. As can be seen from the description given by the district court, the information contained in the documents in question is sensitive financial data which would ordinarily be regarded as confidential by a company, in order to protect its competitive position. Sterling suggests that the information ought not to be protected from disclosure because General Foods did not assert "unusual trade secret needs." But the fourth exemption does not cover only trade secrets, but "trade secrets and [confidential] commercial and financial information." 5 U.S.C. 552(b)(4) (emphasis added). Clerly, trade secrets are not the only ground on which to qualify under the fourth exemption.7/

Finally, Sterling suggests that the Commission waived the confidentiality it had accorded to the General Foods documents

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7/ Nor is there any merit to Sterling's suggestion that the information should be publicly disclosed because it is "the kind of data which typically is disclosed in antitrust merger cases." A great deal of confidential commercial and financial information is frequently taken in evidence in antitrust cases; this does not mean that this information, when in the hands of the Government, is information that must be disclosed to the general public under the Information Act. If the test for disclosure was whether the information in question might be used in an antitrust merger proceeding, the fourth exemption would in effect be repealed, since it is difficult to conceive of any commercial or financial information that might not become relevant in an antitrust merger proceeding.

Sterling's argument on this point illustrates a confusion between disclosure under the Information Act and discovery in litigation. There is a great deal of commercial and financial information that normally would be regarded as confidential but can be discovered in an antitrust proceeding, or in other types of administrative or judicial proceedings. But such information is not generally available to the public under the Information Act.

by relying on these documents in approving the sale of S.O.S. to Miles. Reliance is placed on American Mail Line, Ltd. v. Gulick, 133 App. D.C. 382, 411 F. 2d 696, where it was held that the protection accorded internal staff memoranda was waived when an agency adopted an internal memorandum as part of an opinion. The situation here, however, is different. The very purpose of the fourth exemption is to protect the confidentiality of information which is submitted to the government to enable it to reach a decision: the exemption "serves the important function of protecting the privacy and competitive position of the citizen who offers information to assist Government policy makers." Bristol-Myers Company v. FTC, ____ App. D.C. ___, 424 F. 2d 935, 939 (emphasis added). Yet under Sterling's argument, confidentiality would be lost as soon as the Government relied on the information submitted in order to reach a decision. In short, Sterling would accord confidentiality only to commercial or financial information which the Government received but did not consider. This would, indeed, be a strange state of affairs.

The House Report on the Information Act explained the basic purpose of the fourth exemption:

> * * * It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations. 8/

Here the Commission obligated itself in good faith not to disclose the documents involved. It should be able to honor that obligation

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8/ House Report, supra, p. 10.

II

THIS CASE DOES NOT PRESENT ANY OF THE EXCEPTIONAL CIRCUMSTANCES WHICH WOULD JUSTIFY PERMITTING AN INTERLOCUTORY APPEAL FROM A RULING ON A QUESTION OF DISCOVERY.

The circumstances in which an interlocutory appeal is allowed from a ruling by a trial tribunal on a question of discovery are limited. When appeal is sought from a discovery ruling of a district court, the test is normally stated as whether mandamus is available; and this writ is not to be used where trial courts have merely "erred in ruling on matters within their jurisdiction." [Citation omitted.] Schlagenhauf v. Holder, 379 U.S. 104 at 112. Where, as in the present case, appeal is sought from a discovery ruling by an administrative hearing examiner, the test is whether the ruling is so fundamentally and egregiously wrong as to constitute a denial of a fair hearing, in circumstances where appeal from a final order would be an inadequate remedy. Phillips Petroleum Company v. Brenner, 127 App. D.C. 319, 383 F. 2d 514, certiorari denied, 389 U.S. 1042; Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205 (C.A. 7), certiorari denied, 394 U.S. 910. Interlocutory appeals from district courts and administrative agencies present the same fundamental problem. There are too many rulings on questions of discovery and evidence in the course of a single administrative or judicial trial to permit piecemeal appeals. Moreover, a ruling which seems "fundamentally unfair" to a litigant when made, may assume less drastic proportions when viewed in the context of review of the entire proceeding after a final order by the trial tribunal. And finally, if upon review of the entire proceeding

after a final order, it is apparent that the interlocutory order was fundamentally prejudicial, the case may be reversed and remanded for further proceedings. It is for all these reasons that interlocutory appeals from discovery rulings have not generally been allowed. See Moore's Federal Practice, ¶26.83[2]-[3]. The present case falls within this general rule; none of the exceptional circumstances which have been held to justify interlocutory appeals is present here.

A. If the Commission's Denial of Discovery was in Error, the Error can be Cured upon Review of a Final Order, by a Reversal and Remand for Further Proceedings.

In many cases, this Court and other courts have dismissed as premature attempts to obtain interlocutory review of administrative rulings on questions of discovery, on the ground that review could be obtained after a final administrative order, even where the claim was that the interlocutory ruling rendered the administrative hearing fundamentally unfair. Phillips Petroleum Company v. Brenner, 127 App. D.C. 319, 383 F. 2d 514, certiorari denied, 389 U.S. 1042; Texaco, Inc. v. FPC, 117 App. D.C. 268, 329 F. 2d 223, certiorari denied, 375 U.S. 941; Texaco, Inc. v. FTC, 301 F. 2d 662 (C.A. 5), certiorari denied, 371 U.S. 822; Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205 (C.A. 7), certiorari denied, 394 U.S. 910.

These cases govern here. For if Sterling's allegations are true, and the administrative proceeding against Sterling in fact deprives it of all the rights it claims are being denied, Sterling will have the opportunity in a court of appeals to obtain a

reversal of any adverse decision against it by the Commission. 15 U.S.C. 21(c)-(e). The Administrative Procedure Act specifically provides that "preliminary, procedural, or intermediate agency action or ruling[s] not directly reviewable [are] subject to review on the review of the final agency action." 5 U.S.C. 704; see also 5 U.S.C. 706.

The only hardship Sterling will have to bear by not being able to present its contentions to the Court at this time is that it will have to suffer the expense and delay of presenting its case in the administrative proceeding and subsequent judicial proceedings. But it is clear that such expense -- a normal burden of any litigation or administrative proceeding -- provides no basis for enjoining an administrative action and avoiding the "long settled rule" that a party must exhaust its administrative remedies. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Chamber of Commerce v. Federal Trade Commission, 280 F. 2d 45 (C.A. 8); Lone Star Cement Corp. v. FTC, 339 F. 2d 505 (C.A. 9); Frito-Lay, Inc. v. FTC, 380 F. 2d 8 (C.A. 5).

Sterling argues that its opportunity for judicial review of a final Commission order will not be adequate, for two reasons: (1) because the scope of review of final Commission orders is limited; and (2) because Sterling will lack the evidence on the basis of which it could argue to the Commission and the Court of Appeals that its acquisition should receive the same treatment as the Miles-S.O.S. sale.

The first argument can be briefly answered. The limited scope of review which obtains in judicial review of final Commission

orders generally pertains only to the merits of the case. There is no reason why Sterling will not be able to obtain full review, after a final order, of its claim that it was denied a fair hearing by reason of the Commission's refusal to permit discovery of the documents underlying its approval of the Miles-S.O.S. sale. And if Sterling's entitlement to such documents is considered to be a question of administrative discretion subject only to limited review, surely Sterling cannot avoid limitations on the scope of judicial review by taking an interlocutory appeal.

Sterling's second contention -- that review of a final order is an inadequate remedy because without the documents sought it will not be able to argue the applicability of the Miles-S.O.S. approval -- is also without merit. If, upon review of a final order, the Court of Appeals holds that Sterling was denied a fair hearing because it lacked the necessary documentation with which to support its contention that the Miles-S.O.S. approval governed its case, the Court could then remand to the Commission with directions to reopen the hearing, permit Sterling to inspect the documents it seeks, and introduce any additional evidence and make any additional arguments it may desire on the basis of these documents. Sterling has advanced no reason why this would not be an entirely adequate remedy.

The present case is a good illustration of the wisdom of the rule which prohibits interlocutory appeals from rulings on questions of discovery. If the case is allowed to proceed to a final order by the Commission, the need for judicial review of Sterling's contentions may be entirely avoided. The Commission may hold

that the Sterling-Lehn & Fink merger does not violate Section 7 of the Clayton Act. Or, it may hold that a violation of Section 7 exists only as to product lines not involved in the Miles-S.O.S. sale. In such event, of course, Sterling's present contentions would become moot. Then again, the Commission may hold that Sterling has violated Section 7 and may agree that the Miles-S.O.S. situation is similar, but may go on to explain that the sale of S.O.S. to Miles was approved not because of a finding that it did not violate Section 7, but rather because Miles was the least objectionable feasible purchaser of the S.O.S. business; and it was deemed preferable to have Miles purchase the business rather than having the divestiture order against General Foods fail because of lack of purchasers. This, indeed, would be consistent with the Commission's statement in its latest interlocutory order that the possible resemblance of the facts of Miles-S.O.S. to the fact of Sterling-Lehn & Fink is not pertinent (App. 39). Or if, contrary to the statement in its interlocutory order, the Commission were to consider the Miles-S.O.S. approval as a precedent under Section 7, it could then give a full factual comparison between Sterling's case and the Miles-S.O.S. case, pointing out factual differences and explaining why it deems those differences to be significant. (Compare the Commission's lengthy treatment of the earlier Proctor & Gamble-Clorox case in the General Foods-S.O.S. decision.9/)

9/ General Foods Corp., Trade Reg. Rep. ¶17,465 (FTC, 1966) [1965-1967 Transfer Binder]. This situation was, of course, different in that the prior Proctor & Gamble-Clorox ruling was a decision on the merits after a full adjudicatory hearing, unlike the ex parte action in Miles-S.O.S.

Any one of these courses of action on the Commission's part would cast an entirely different light on Sterling's asserted right to discovery of the documents it now seeks, and would enable a court of appeals upon review to more intelligently assess Sterling's contentions.

B. Sterling has not Shown a Violation of Fundamental Rights Requiring Interlocutory Judicial Intervention.

Sterling contends that the Commission's refusal of discovery is such a gross violation of its rights that it is justified in short-circuiting the normal process of judicial review. However, Sterling has overlooked some very real and difficult problems involved in its request for discovery.

In order to reconstruct the reasons for the Commission's approval of the Miles-S.O.S. sale, Sterling seeks to look at all the staff memoranda concerning that sale. But since the Commission never officially adopted any of its staff memoranda (unlike the situation in American Mail Lines, Ltd. v. Gulick, supra), all that Sterling would obtain would be a collection of staff recommendations that might or might not represent the views of the Commission. There is no more reason to conclude that these staff memoranda represent the Commission's views, than there would be to conclude that a law clerk's memorandum represented a judge's view in a case where the judge hands down an order in that opinion. Neither the Commission's staff memoranda, nor the law clerk's memorandum, are discoverable in later litigation.

Moreover, if these staff memoranda are held to be available to Sterling, the effect will be to hamper the free flow of policy

advice and recommendation within the Commission, since staff members will then be on notice that any views they express in internal memoranda might be later taken as the official view of the Commission in any case where the Commission acts without writing an opinion of its own. 10/

Sterling contends that these difficulties could be avoided -- and full protection given for staff memoranda and supporting documents -- if the Commission would give a full statement of facts and reasons for every action it takes. However, it has never been a requirement that an administrative agency must give such a statement for every action taken, and such a requirement would be obviously impractical. To be sure, when an agency takes action adverse to a party seeking relief, then it must give a supporting statement in order to enable that party to obtain meaningful judicial review. FTC v. Crowther, ___ App. D.C. ___, 430 F. 2d 510 at 514. Thus, if the Commission had disapproved the Miles-S.O.S. sale, it may have been required to give a statement of reasons in order to enable General Foods and Miles to obtain meaningful judicial review. But there has never been any requirement that when an agency takes action favorable to the party seeking relief, it must also write an opinion so that litigants in other cases might be able to assess the precedential effect of the prior decision. Such a rule of administrative law would be obviously impractical, since many agencies issue hundreds of thousands, indeed millions, of orders each year, and could

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10/ See Ackerly v. Ley, supra, at p. 16.

not possibly issue an opinion in connection with each action taken.[11]

Of course, an agency might decide to adopt a regulation requiring a statement of reasons in a limited class of cases (as it did subsequent to this case for approval of compliance plans[12]). However, what Sterling seeks to have this Court hold is that as a matter of general administrative law, an agency must either give a statement of facts and reasons for every action it takes -- even if favorable to the party seeking relief -- or otherwise lay bare for subsequent public inspection all the internal memoranda and supporting documentation behind every action. Since agencies simply cannot write an opinion every time an action is taken, the effect of such a rule would be to substantially repeal the protection which has previously obtained for internal staff policy advice and recommendations. The consequence would be -- as this Court pointed out -- to encourage bureaucratic hedging and timidity in the giving of staff advice.[13] In addition, such a rule would destroy the confidentiality presently accorded to commercial and financial information which businesses submit in connection with obtaining regulatory approvals, since businesses

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11/ See Davis, The Information Act: A Preliminary Analysis, 34 U. of Chi. L. Rev. 761, 782 (1967):

> The Social Security Administration issues more than four million orders a year, the Bureau of Customs three million orders, the Department of Agriculture two million feed grain and wheat diversion orders, and the FCC more than one million licenses (each an order).

12/ 16 C.F.R. 3.61(e).

13/ See Ackerly v. Ley, supra, at p. 16.

would realize that the confidentiality would be waived whenever the approval is given without a supporting statement of reasons.

Even if the Commission were to give a statement of facts and reasons every time that it takes action favorable to the party seeking relief, there is no guarantee that this would satisfy Sterling's contentions. For the statement of facts may well be inadequate for Sterling's purposes, while the statement of reasons might not be responsive to the particular contentions that Sterling is making. As this Court well knows, opinions are generally written with a view to the contentions made by the parties involved in the particular case, and are responsive to those contentions. But Sterling here is seeking to construct an opinion of the Commission in the Miles-S.O.S. case that would be responsive to the contentions Sterling is making in its case. This would go far beyond any requirements previously imposed. It may well be that in its own case, Sterling would be entitled to an opinion of the Commission if it finally decides the case adversely to Sterling, explaining why Miles-S.O.S. does not govern Sterling-Lehn & Fink. See Federal Trade Commission v. Crowther, ___ App. D.C. ___, 430 F. 2d 510. But to say that the Commission should have written such an opinion when it approved the Miles-S.O.S. sale is an entirely different matter.

Moreover, even if Sterling were entitled under Gulick to attempt to construct an opinion for the Commission in the Miles-S.O.S. case, its attempt to inspect the Commission's internal staff memoranda goes farther than that. For most of the internal memoranda which Miles seeks are dated after the Miles-S.O.S.

approval[14] and, as described by the district court, are principally staff discussions of what disposition to make of Sterling's case in view of the Commission's decision in Miles-S.O.S. Sterling's excuse for inspecting these documents is apparently that it wants to determine the reasoning of the Commission's staff which underlies the broadening of the allegations of anticompetitive effect in the final complaint, as opposed to the allegations in the proposed complaint issued before the Miles-S.O.S. decision. But there is nothing in the Gulick decision which even remotely suggests that parties to administrative proceedings are entitled to inspect internal staff memoranda discussing the litigation strategy of the agency's staff. Clearly, there is no conceivable theory under which Sterling would be entitled to these documents.

In short, Sterling's request for discovery raised grave legal and practical problems. To hold that it was entitled to such discovery would go far beyond any requirements previously imposed on administrative agencies by the courts. Clearly, then, the Commission's denial of discovery was in no sense the type of egregious denial of fundamental rights that requires interlocutory judicial intervention.

14/ The Commission's approval of the Miles-S.O.S. sale was dated July 12, 1968 (App. 8). Of the 14 internal documents that Sterling seeks (described in the district court's opinion, App. 73-77), 11 are dated after July 12, 1968.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

L. PATRICK GRAY, III,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ROBERT V. ZENER,
BARBARA L. HERWIG,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24878

STERLING DRUG INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, and CASPER W. WEINBERGER, PAUL RAND DIXON, PHILIP ELMAN, MARY GARDINER JONES, and EVERETTE MacINTYRE, as members thereof,

Defendants-Appellees.

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR MILES LABORATORIES, INC. AS AMICUS CURIAE

Jerrold G. Van Cise
Donald J. Mulvihill
CAHILL, GORDON, SONNETT, REINDEL
& OHL
Attorneys for Miles Laboratories, Inc.
1819 H Street, N.W.
Washington, D.C. 20006
223-3350

Of Counsel:

Mathias E. Mone

December 23, 1970

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Miles Laboratories, Inc. (hereinafter "Miles"), respectfully submits this Brief Amicus Curiae in support of the position of appellees herein.

Preliminary Statement

Miles argument to this Court will be limited to that portion of the ruling below which held that certain

of the documents which are the subject of this appeal are exempt from disclosure for the reasons that, inter alia, they contain highly confidential business information and trade secrets as to which the appellee Federal Trade Commission properly extended confidential treatment.

Statement of Facts

This action was commenced by the filing of a complaint for injunctive relief in the District Court on July 7, 1970. Therein, plaintiff Sterling Drug Inc. (hereinafter "Sterling") alleged that it is a respondent in an administrative proceeding brought by the defendant Federal Trade Commission (hereinafter the "Commission") which proceeding seeks to set aside the acquisition by Sterling of Lehn & Fink Products Corporation. The complaint states that Sterling seeks to cite as precedent for defending its action the fact of Commission approval of the acquisition by Miles of S.O.S. In connection therewith, Sterling sought access to certain documents relating to the Miles-S.O.S. acquisition which are contained in the Commission's files. The Commission denied Sterling access to these documents and the complaint in the District Court followed.

The complaint seeks an order compelling defendants to either produce the subject documents or refrain from

taking any further action against Sterling in the pending administrative proceeding.

On October 12, 1970, the Commission filed a motion to dismiss the complaint, or in the alternative, for summary judgment. On November 17, 1970, Sterling opposed the Commission's motion and cross-moved for partial summary judgment.

On December 2, 1970, Miles filed a motion to intervene as a party defendant for the purpose of filing a memorandum in support of the Commission's position as to the confidentiality of the subject documents. Therein, Miles pointed out that, as an applicant for approval as purchaser of S.O.S., it had submitted numerous documents to the Commission with the express request that they be afforded confidential treatment since they contained competitive information and other materials of a trade secret nature.* (Motion to Intervene, p. 2). Moreover, Miles' motion set forth the reasons why the information submitted by it in 1968 was still considered by it to be highly sensitive and why its release would result in an unfair advantage to Miles' actual and potential competitors. For example, Miles

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* Miles attached to its motion copies of two letters of its counsel dated July 9, 1968 and October 9, 1968 which transmitted the documents to the Commission. Both letters recited Miles' understanding that confidential treatment would be afforded to the submissions by the Commission.

pointed out that the submitted S.O.S. figures relating to warehousing costs, costs of goods, costs of transportation and gross profit were all current. Similarly, the submission discussed new product lines which Miles is presently developing. (Motion to Intervene, p. 3; Memorandum of Miles, p. 3).

Much of the same information originally submitted by Miles was resubmitted as part of General Foods Final Compliance Report to the Commission in Docket No. 8600 (the Commission proceeding wherein General Foods was ordered to divest itself of S.O.S.). The trade secret portions of this final submission by General Foods were also afforded confidential treatment by the Commission. (Motion to Intervene, p. 2).

On December 4, 1970, Judge Bryant rendered his opinion granting the Commission's motion and dismissing the complaint. Therein the Court held, first, that it lacked jurisdiction to intervene in the agency proceeding pursuant to the Administrative Procedure Act (5 U.S.C. 554(c)) (Op., p. 6) and, second, that the documents are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(4),(5)) (Op., pp. 6-12). Thus, after an in camera review, Judge Bryant held that the documents were covered,

inter alia, by the "exemption accorded trade secrets and sensitive confidential or financial information obtained from a person in order to protect his privacy and competitive position."* (Op. p. 7).

Argument

The District Court Properly Found That The Materials Submitted By Miles And General Foods Should Be Protected From Public Disclosure

In its motion to the District Court, Miles pointed out that its request for confidential treatment of the subject documents was not raised, as appellant suggests, until months after the submission of the documents (Appellant's Motion to Expedite Appeal, p. 3, N. 1), but rather was made at the time of the submission by Miles. Moreover, Miles emphasized that it was given assurance that the documents would be held in confidence by the Commission. Under these circumstances, the Commission's refusal of appellant's request for production of the documents was proper and the District Court's denial of relief to appellant was similarly correct.

Thus, the Court properly found that the materials submitted to the Commission by Miles and by General Foods

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* Certain of the other documents were excluded when, after inspection, they were found to be intra-agency memoranda (5 U.S.C. §552(b)(5)).

Corporation, which were submitted with the express understanding that they would be received in confidence and afforded confidential treatment under the Commission's rules are exempt from disclosure under the Freedom of Information Act (5 U.S.C. §552).

Subparagraph 4 of said Act specifically exempts from disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The legislative history of this subsection makes clear that Congress enacted the provision to protect precisely the kind of document which appellant would have the court disclose. The Senate Report on the Act (89th Cong., 1st Session, No. 813, p. 9) states that the exemption is necessary to "protect the confidentiality of information which is obtained by the 'Government' through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." Recognition of this interpretation was set forth in Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F. 2d 578, 582 App. D.C. (D.C. Cir., 1970) where the Court dealt with a request for production of materials which originated outside the Government:

> "After examining those documents the District Court must decide whether they contain commercial or financial information which the contractor would not reveal to the public. . . ."

Here, appellant's request involves documents which were submitted by Miles to the Commission with the understanding they would be held in confidence and not be disclosed and which contain sensitive financial information which Miles would not reveal to the public.

Moreover, Miles submits that the documents are exempt from availability for public inspection under the Commission's Rules of Practice and Procedure. Section 4.10 (a)(2) of said Rules expressly exempts from public inspection "commercial or financial information obtained from any person which is customarily privileged or which is expressly received by the Commission in confidence." The information submitted by Miles and by General Foods, relating as it does to highly protected areas such as market shares, profits, costs and new product lines is customarily privileged and was expressly received in confidence; thus, satisfying both of the two alternatives set forth in the Rules.

Conclusion

For the reasons set forth, the order of the District Court should be affirmed.

Respectfully submitted,

Jerrold G. Van Cise
Donald J. Mulvihill
CAHILL, GORDON, SONNETT, REINDEL & OHL
Attorneys for Miles Laboratories, Inc.
1819 H Street, N.W.
Washington, D.C. 20006
223-3350

Of Counsel:

Mathias E. Mone

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